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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO.

TURNBULL CONE BAKING COMPANY
OF TENNESSEE

Petitioner

VERSUS

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

David E. Walker
WALKER, BORDELON, HAMLIN
& THERIOT
701 South Peters Street
New Orleans, Louisiana
Telephone: (504) 524-5328

ATTORNEYS FOR PETITIONER

HAUSER PRINTING COMPANY, INC., 5720 HEEBE STREET, HARAHAN, LA. 70123

QUESTIONS PRESENTED

1. Whether the acceptance of the General Counsel's proof that an employee's protected activity is a motivating factor in a Section 8(a)(3) layoff case under the L.M.R.A. necessarily rejects, *sub silentio,* the employer's rebuttal evidence under *Wright Line,* 251 N.L.R.B. 1083 (1980) and this Court's decision in *N.L.R.B. V. Transportation Management Corp.*, 462 U.S. 393 (1983).

2. Whether the order of the Administrative Law Judge, and the review thereof by the United States Court of Appeals, Sixth Circuit, are of such a nature to be violative of the Fifth Amendment, United States Constitution, provisions regarding due process of law.

PARTIES TO THE PROCEEDING

Turnbull Cone Baking Company of Tennessee
National Labor Relations Board
Local Lodge No. 56, International Association of Machinists and Aerospace Workers
Nella Broadwell
Mark Raborn

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Turnbull Cone Baking Company of Tennessee respectfully petitions for a Writ of Certiorari to review the December 11, 1985 decision of the United States Court of Appeals for the Sixth Circuit in the subject case.

OPINIONS BELOW

The December 11, 1985 opinion of the United States Court of Appeals for the Sixth Circuit in *Turnbull Cone Baking Company of Tennessee v. National Labor Relations Board,* No. 84-5930/6035 is reported at 778 F.2d 292 (1985). The opinion of the National Labor Relations Board that was enforced by the Court of Appeals is reported at 271 N.L.R.B. No. 203 (1984).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals for the Sixth Circuit, dated December 11, 1985.

STATEMENT OF THE CASE

Turnbull Cone Baking Company is one of the few manufacturers of ice cream cones in the United States, having begun its operations in Chattanooga, Tennessee in 1910. From 1923 until 1982 the Company conducted its manufacturing operations in a four story building located on Carter Street.

On the top floor of that building there were nine cone baking machines. Seven of these were devoted to manufacturing odd-shaped cones known as "fountain pack" or "food service" cones. Two of the fourth floor machines were devoted to the baking of standard cup size cones known as "retail service" cones. On the second floor and the third floors there were six retail service cone baking machines per floor. On the first floor there were seven sugar roll baking machines.

The twenty-eight machines described above were all custom built. The machines used by Turnbull had been

built on site beginning in 1907 and had not been changed since that time. These old basic cone machines had a production limitation of five thousand cones per hour. By 1980, competition from other cone manufacturers using European-built machines was achieving a production of twenty-five to thirty thousand cones per hour. Partly because of this, and other operational inefficiencies, Turnbull Cone Baking Company showed a profit of only one quarter of one percent on sales of three million dollars in 1980.

Turnbull employed, at the peak of its seasonal business, approximately sixty nonsupervisory employees working as cone packers, floor ladies, cone machine operators, shipping employees and batter-mixers. Because the manufacture and sale of ice cream cones is a highly seasonal business, the employees of Turnbull would typically be recalled from layoff each year in the late winter or early spring, and then laid off for lack of work in the fall of each year. In addition, because the orders placed by customers fluctuate with little advance notice, a practice of adding a second shift and then laying off the second shift when demand would not justify the additional production also existed.

None of the employees of Turnbull have been represented for purposes of collective bargaining by a labor union. There was no organizational activity at the Turnbull plant until 1981, and the employer was not placed on notice of that activity until June of 1981.

In the summer of 1980 discussions began within Turnbull management on the subject of liquidation versus relocation of the cone manufacturing business. In July and August of 1980 proposals were made by Greg Overton, then the chief operating officer of Turnbull Cone

Baking Company of Tennessee, to the Turnbull Board of Directors wherein a new plant would be constructed and the old manufacturing operation moved from Carter Street to a modern facility. As shown by Respondent's Exhibit No. 11 Overton's proposals were grounded on labor savings that would result by moving from the four floor operation into a one floor manufacturing layout. Later that same year Overton presented an application for the issuance of industrial revenue bonds to the City of Chattanooga's Industrial Development Board. This financing was approved in November of 1980, and construction of a new plant began.

Overton quit in early 1981, going into business in competition with Turnbull and succeeding in taking with him some of the "...increased volume that [he was] projecting..." in the form of Turnbull customers. Plans for construction of the new plant proceeded nonetheless.

In January of 1981 Wayne W. Turnbull replaced Greg Overton as chief operating officer of the Company. That month a meeting of all employees was called by Wayne Turnbull for the purpose of discussing the impending move to the new plant and countering rumors on that subject. In his talk Turnbull used the analogy of a football spring training camp to describe his proposal for employee training in anticipation of the move to the new plant. He told the people that certain of the baking machines would be combined in the old building and that this would create an opportunity for the employees to learn new skills, necessary before an employee could be transferred to the new plant. Turnbull testified that he told the employees "...we hope that all people could be included in the move..." It was recognized (and that fact accepted by the ALJ) before the start of union organizational activity that not all of the employees on

the payroll in the spring of 1981 would be needed to operate the new plant.

The key to increasing productivity per unit of labor cost at the new plant was based upon the idea that a number of existing retail service cone baking machines could be efficiently combined, or "ganged", on one conveyor belt. Respondent Ex. No. 16 shows an early blueprint layout (January, 1981) in which the ideal of ganging six of the existing retail service machines on one conveyor belt in the new plant was schematically drawn. This work, according to the testimony of Julian Bell, a consulting engineer, was done in January and February of 1981. In a meeting on February 12, 1981, the projected staffing in the new plant, based upon the new production methods, was discussed with the Turnbull supervisors.[1]

Turnbull first succeeded in combining two machines on one conveyor belt on the second and on the third floors toward the end of March. All of the cone packing employees were asked, in order of their seniority, to train on the combined machines. The employees were expressly advised that the training was in preparation for the automation that would exist in the new plant and that Turnbull wanted to observe the ability and willingness to change on the part of individual employees. This understanding was acknowledged by witnesses called by the General Counsel at the hearing herein and accepted by the Administrative Law Judge (D-11, lines 15-21).[2] Turnbull afforded its

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1. Prior to Turnbull's arrival in January of 1981, there was only one first line supervisor in the plant: Tom Hood. In January and February of 1981, Wayne Turnbull promoted two floor ladies, Betty Dawson and Evelyn Broadwell, to supervisory status.

2. References to the N.L.R.B. decision herein are identified by the prefix "D".

employees at least three chances each to qualify on the combined machines. The experience of the employer in this training endeavor varied. As noted by the testimony of Juanita Prince: "... some of them didn't want to, or couldn't do it."[3]

As people refused or were unable to qualify on the combined machines they were reassigned throughout the spring months to work on single food service machines on the fourth floor.[4] This reassignment was necessarily short-term for as early as January, 1981 it was decided that cone baking machines of marginal utility would have to be sold, in order to raise much-needed capital for construction. Thus in January the seven specialized "fountain pack" or "food service" machines on the fourth floor of the building were put up for sale. By May of 1981 contracts for the sale of six of those seven machines had been signed. The seventh machine was disassembled and used for spare part inventories in March and April of 1981.

The prospect of laying off persons working on the fourth floor as inventory was increased, and the necessity for dismantling and shipping the machines became imperative, was one that management had long anticipated. This is proven by testimony by all company witnesses *and a contemporanous memorandum in ear-*

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3. Among the witnesses called by the General Counsel, two admitted *refusing* the opportunity to qualify on the combined machines: Ellen Finley and Wilma Varner. Both are ordered reinstated, with backpay, by the ALJ's Decision.

4. As stated in his testimony, Turnbull explained the move of the employees to the fourth floor as being "... basically people who were not willing to learn the new skills or not able to learn the new skills, or had rates of absenteeism, whereby they became unreliable because of their absenteeism; each time one individual was absent resulted in one machine being shut down. Those with these types of problems... they were moved whenever feasible... they were moved to the fourth floor."

ly March, 1981 which forecast shutting down the fourth floor in July of that year (R. Ex. No. 28).

In June disassembly on the fourth floor machines that had been sold began, as Turnbull began balancing the need for additional capital against the need to assure that sufficient inventory was on hand.

In addition, Turnbull decided to sell all six sugar roll machines on the first floor. Turnbull realized it could buy sugar roll cones for resale cheaper than it could manufacture these cones with the old machinery located on the first floor. Solicitation of buyers for those machines began in May of 1981.

During the same time that Turnbull was taking steps to sell all of its marginal machinery, i.e., machinery that could not be combined and form an automated production line, a second shift was added so that inventory could be increased in anticipation of the dislocation that would result from the move to the new facility in the fall of 1981.

In June, notice was first given to Turnbull that certain of its employees were engaged in union organizational activity. At some point that month, supervisor Betty Denton realized that Willie and Mae Caldwell (former employees) were handing out union literature and cards at the plant door.[5] In late June, four employees each told supervisor Yvonne Broadwell that a union was trying to organize the Company.

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5. Evidence submitted by the General Counsel shows that 41 of the 45 cards signed by Turnbull employees were all dated after the week of June 22nd (G.C. Ex. No. 15-1 through 15-45). One of the other principal union organizers testified that he could not "recall" the name of any person who was given a card at the plant before June 25, 1981 (R-101).

The first of the anticipated substantial layoffs occurred on July 10, 1981. Twenty-eight persons were laid off by reason of their poor evaluations, poor attendance or their placement in jobs due to their inability or refusal to qualify on the combined machines. Prior to this large layoff, there had been a layoff of seven or eight employees in early June for similar reasons. That earlier layoff was not placed at issue in this proceeding by the union.

On July 11, 1981, Wayne Turnbull addressed a meeting of all employees who were retained at the Turnbull plant. In this address he told the employees that they were basically engaged in starting "a new business" and demurred when asked about further layoffs.

Shortly thereafter Turnbull determined that inventories had reached a sufficient level to accommodate dislocation losses, and that it was no longer necessary to run a second shift. As a result, all nine persons assigned to the second shift were laid off effective July 22, 1981. This layoff was not determined on an individual employee basis, as was the one on July 10th, but rather was a reduction in force of all persons assigned to the second shift. Turnbull anticipated that some overtime might be needed in view of the loss of the second shift production, but that was calculated and determined to be far less expensive than retaining all of the nine employees on the shift (R. Ex. No. 23.).

Ten days earlier, on or about July 12, 1981, the union reportedly conducted an organizational meeting at its headquarters in Chattanooga. Tom Hood, a Turnbull supervisor, was in the vicinity of the union hall that afternoon and was stopped by Messrs. Willie Caldwell,

James Hawthorne and Clarence Fitzgerald. Hood advised these gentlemen that he was in the area because he had brought his sister or one of his relatives to a flea market within three or four blocks of the union hall. Wayne Turnbull testified that he was not personally aware of the incident until three or four weeks after July 12th. He further stated that he had neither known of the meeting, nor of Hood's presence there until well after the decision to layoff the second shift had been made and effectuated.

Charges of discrimination under Section 8(a)(1) and (3) of the L.M.R.A. were filed on August 6, 1981, by 19 of the 28 persons laid off on July 10th. All nine of the employees laid off July 22nd filed similar charges. These matters were consolidated and tried as Case No. 10-CA-17282.

The Company's move to the new facility on Parmenas Road was completed around the first of 1982, following a period in which operations were occurring at both locations. The new layout has eight cone packers now running twelve cone baking machines, whereas at the Carter Street plant the manning for twelve cone baking machines was a minimum of fourteen persons. Respondent's Exhibit No. 24 shows the new layout at the new plant schematically, with six cone baking machines tied into one conveyor, another six tied into a second conveyor and two cone baking machines tied into a third.

In early 1982 the Company hired temporary labor to assist in clearing out old packing material and to help start up new lines. These were the first new employees since well before the July 1981 layoffs. These offers of temporary employment were sent to all female employees laid off on July 22, 1981. None of the men

laid off on July 22 were offered temporary jobs as there have been no jobs filled since that time requiring skills held by these employees. At the same time offers of temporary employment were also made to two persons who had been laid off on July 10, 1981: Joanne Cranmore and Linda Lee.

Among the employees hired on a temporary basis in early 1982 was Nella Broadwell, the alleged discriminatee in Case No. 10-CA-18157. Broadwell was hired February 26, 1982 as a production worker, and terminated for insubordination April 22, 1982. Broadwell had an unfortunate habit of neglecting her work in preference to extended chit-chat with other employees. She was warned on more than one occasion and finally given explicit instructions not to talk to employees J. Summers or M. Raborn while at work.

On April 22, 1982, Broadwell observed supervisor Denton assisting a rank-and-file employee, Nina Clark, in Clark's job, the two persons talking while inspecting cones. Broadwell approached Denton and launched into a loud tirade, complete with curse words directed at Denton, including calling Denton a "damn liar". Broadwell's anger was based upon her feeling of unequal treatment. Nina Clark, a rank-and-file employee, witnessed and heard the entire outburst.

One of the posted Company rules expressly lists "insubordination" as a reason for termination. Nella Broadwell was terminated later that day.[6]

During the period of transition to operations in the

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6. At a subsequent private meeting requested by N. Broadwell, she admitted to W. Turnbull that she had acted wrongly on the 22nd, and further that she had directed profanity at her supervisor (D-60).

new plant in 1981-82, various of the older, permanent employees were asked to perform in a variety of positions. One such employee was Mark Raborn. Raborn in this period worked as a mechanical helper, machine operator, batter mixer and inspector. Raborn volunteered to everyone in the plant that he was an active union organizer. At the same time he did not make any effort to hide his hostility to the Company and to supervisor Denton (D-61).

On or about May 6, 1982 Raborn was transferred to the third shift (i.e. 10 p.m. to 7 a.m.). Raborn balked at the instructions of floorlady M. Coots and persisted in a pattern of non-cooperation and loafing on the job. Raborn had been counseled several weeks earlier about his substandard performance. The failure of M. Raborn to perform culminated on the May 11-12 shift, at which time Wayne Turnbull paid a surprise visit to the plant, finding Raborn's machines inoperative, ice cream cones scattered everywhere and at least one employee threatening to quit unless something was done about Raborn. Turnbull terminated Raborn that morning for:

> "not doing assigned work properly. Continued efforts to change his work habits to no avail. Extremely poor attitude toward cooperation with fellow workers." (D-63)

Charges of Section 8(a)(3) discrimination were filed by both Broadwell and Raborn in May, 1982. Over objection by Turnbull these matters were consolidated with the earlier N.L.R.B. case, i.e., No. 10-CA-17282.

Following two separate series of hearings, Decision was issued by Administrative Law Judge Nancy M. Sherman on December 30, 1982, directing reinstate-

ment and backpay for twenty-three of the thirty Charging Parties.

THE COURT OF APPEALS IN FAILING TO APPLY A BURDEN OF PROOF ALLOCATION AS REQUIRED BY *WRIGHT LINE,* 251 N.L.R.B. 1083 (1980), IS IN CONFLICT WITH BOTH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND THIS COURT'S APPLICABLE DECISIONS.

This Court has established a clear procedure for the shifting of burdens in trial of § 8(a)(3)[7] unfair labor practice cases where valid business reasons are asserted by a respondent employer. This procedure requires that the General Counsel first discharge the burden of proving that the employee's conduct, protected by Section 7 of the Act, was a substantial or a motivating factor in the disputed discharge. The burden of persuasion then shifts to the employer, who can avoid being found in violation of § 8(a)(1) and §8(a)(3) by proving that the employee would have lost his job *notwithstanding his § 7 protected activity.* This standard was set forth by *Wright Line,* 251 N.L.R.B. 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and endorsed by the United States Supreme Court in *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393 (1983). In *Transportation Management Corp.,* the Court at p.400 described the employer's burden under *Wright Line* as being:

> . . . proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried

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7. References to the Labor Management Relations Act, as amended, will be to the original sections of the Act and not to the U.S. Code designation. To illustrate, Section 8(a)(3) is found in 29 U.S.C. § 158(a)(3).

> the burden of proof by a preponderance of the evidence. "The shifting burden merely requires the employer to make out what is actually an affirmative defense . . ." *Wright Line, supra,* at 1088, n.11; see also id., at 1084, n.5.

The *Wright Line* procedure applies only in cases of "dual motives", and as pointed out by the Supreme Court in distinguishing *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), the "dual motive" or *Wright Line* case is one in which there are two or more motives behind the decision to terminate, and is not the case in which ". . . the issue is whether either illegal or legal motives . . . were the true motives behind the decision." *Transportation Management Corp., supra,* at 400, fn5. Thus if the Board rejects the employer's asserted business motive as pretextual then *Wright Line* has no application;[8] but where the Board agrees with the employer's affirmative defense or business reason then under *Wright Line* there can be no violation of §8(a)(3). If the Board finds a violation in such a case then it has committed legal error.

In the present case the Administrative Law Judge directed the reinstatement, with backpay, (1) of twelve employees who were among nineteen laid off on July 10, 1981 and (2) of all nine employees who were laid off on July 22, 1981 (D-86), because of her conclusion that ". . . all the alleged discriminatees separated in July 1981 were included in these separations because of their union activity or suspected union activity."

The General Counsel sought to prove his case through

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8. For a case where the Board denied application of Wright Line because the employer's rationale was concluded to be "pure pretext," see *Republic Die and Tool Co. v. N.L.R.B.*, 680 F.2d 463 (6th Cir. 1982).

testimony describing a frenetic organizing campaign starting in April of 1981, which campaign became increasingly public as the move to Turnbull's new plant drew closer.

Turnbull responded by proving the layoffs of July 1981 would have occurred *regardless* of the Local Union No. 56 organizing campaign. The facts proving the valid business reasons prompting the layoffs *and* the identification of the personnel affected were undisputed in large part and *in fact were adopted by the Judge in finding that the union organizational activity did not cause the July layoffs.* The ALJ refused to agree with the central argument of the General Counsel, i.e., that the startup of union organizing activity prompted Turnbull to layoff the twenty-eight employees in July rather than taking his entire workforce to the new plant. The Judge's conclusions were phrased as follows:

> "...that the record fails preponderantly to show that Respondent had a fixed and constant intention, before the Union's advent, to transfer all the employees to the new plant."

and that

> "...the record fails preponderantly to show that it was the Union's advent which motivated Respondent's 1981 decision not be retain its entire work force." (D-86)

In yet another context the same affirmance of the validity of the employer's business decision was stated as follows:

> "I infer from these circumstances and the probabilities of the situation that at all material times

before the move took place, Respondent hoped and expected that the move would enable it to use fewer employees than previously . . ." (D-80)

The foregoing findings clearly establish this as a "dual motive" case, subject to *Wright Line.* Compare *N.L.R.B. v. International Erectors, Inc.,* 712 F.2d 1131, (7th Cir. 1983) where *Wright Line* was not applied because ". . .the decision to lay off employees was made in response to the union's drive . . ." 712 F.2d 1131, 1137. Here in contrast the ALJ confirms that *the layoffs would have occurred notwithstanding union activity* at the Carter Street plant. Compare, too, *Birch Run Welding & Fabricating, Inc. v. N.L.R.B.,* 761 F.2d 1175 (6th Cir. 1985) where retaliation in a "general manner" against the entire workforce was shown. Here in contrast to *Birch Run,* individual anti-union motivation behind selection for layoff must be shown for a prima facie case.

The overwhelming conclusion that one draws from the record (one that even the ALJ had to admit as noted *supra*) is that this employer, in good faith and without dreaming of union organizational activity among its employees, launched an ambitious course of action aimed at revitalizing its old and proven business. At the end of this course would be a new plant, with new labor-saving techniques of manufacture — with fewer employees. The ALJ noted that Turnbull in October of 1980 was projecting a reduction-in-force at the new plant of forty employees (D-4, lines 13-15). All of this was proven beyond doubt to have occurred well before Local No. 56 first contacted the first Turnbull employee.

Coincident with the planning for the new plant, and partly prompted by a need for additional capital, in January and February of 1981 Turnbull began efforts to dispose of unneeded baking machines both on the

fourth floor ("fountain service" machines) and on the first floor ("sugar roll" machines. The record is undisputed that Turnbull had even *committed to those sales* before the union claims to have started its organizational activity at Turnbull. Because of these early decisions *it was recognized by management as early as the first week of March, 1981 that shutdown of the fourth floor would be necessary ". . . no later than the first week in July. . . " (R. Ex. No. 28).*[9]

Because the new plant would manufacture cones by "ganging" more than one baking machine, Turnbull sought in the first half of 1981 to train its employees on the new manufacturing techniques using several pilot lines ("double machines") at the old plant. Upon the evidence before her the ALJ described this management effort as follows:

> Turnbull decided to "team" or "gang" certain machines on the second and third floor, so that two of them would deposit cones on a single conveyor belt and to assign a single employee to pack the cones from both machines. Turnbull reached this decision partly "to get the people ready with the concept of change, of seeing a lot of cones coming at them at one time," partly to find out "who was really interested and willing to try new things and to learn new skills," partly to develop new employee skills, and partly to learn what problems would be incurred at the new plant, where the product of six machines was to be deposited on a single conveyor belt. About the end of March, Respondent ordered

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9. The importance of this exhibit under the *Wright Line* rationale is clear. If the employer intended a layoff because of a business prompted shutdown of a designated floor then affected employees cannot complain of discriminatory discharges under the Act.

the conveyors and belts need for this rearrangement. (D-11)

As the tryouts on "double machines" progressed, employees were transferred to the fourth floor (which was being phased out as described *supra*). the Chief Operating Officer of Turnbull testified:

"...basically, people that were not willing to learn the new skills or not able to learn the new skills, or had high rates of absenteeism, whereby they became unreliable because of their absenteeism each time one individual was absent resulted in one machine being shut down. People that these types of problems...they were moved, whenever feasible, when we needed the fourth floor. Sometimes for a period of time, sometimes for a week at a time." (R-625).

The ALJ quotes this testimony, with apparent credit, and notes that Turnbull in further explanation testified that all of the employees later laid off on July 10th,

"...couldn't all physically work on the fourth floor, because there was only a couple of machines running up there at the time. Both shifts. But these were people that had been primarily designated fourth floor type employees, because they had tried these other job skills and didn't grade out well on them." (D-22)

In sum, a layoff of a considerable number of employees had been forecast in early 1981. *There is no question* but that the motivation for such a cutback was valid and business related. Focus on the employees informally classed as "fourth floor" employees had occurred as ear-

ly as March (Resp. Ex. No. 28). The union activity at the old plant did not begin — according to the ALJ — earlier than April of 1981 (D-12). By far the greatest amount of union activity occurred after the week of June 22nd as forty-one of the forty-five union cards put into evidence by the General Counsel are dated thereafter (G.C. Ex. 15-1 through 15-45). The assignment of employees (following training) to the "fourth floor" had already occurred.

The ALJ does not discredit the proof adduced by Turnbull to the effect that (1) a layoff was prompted by business considerations, and (2) the layoff would be of employees not willing or able to learn the new skills, or prone to excessive absenteeism, i.e. persons assigned to the "fourth floor". Despite the affirmative defense posed by Turnbull, the ALJ did not address the *Wright Line* allocation of burdens. She simply concluded that "...all of the alleged discriminatees separated in July, 1981 were included in these separations because of their union activity or suspected union activity."

This assignment of error was ignored, without comment by the N.L.R.B. in its affirmance of the ALJ.

The Sixth Circuit, however, did address Turnbull's argument and concluded that the Board had complied, albeit *sub silentio,* with the requirements of *Wright Line,* by finding that Turnbull had not proven its affirmative defense. The Court said:

> The ALJ *appears to have credited aspects of both contentions,* in that she acknowledged a legitimate motive for discharging some workers (the move to the new plant), but found that the workers actually terminated or laid-off had been selected for illegal reasons (their real or suspected union activity).

> Turnbull's argument for reversal on this point is that the ALJ failed to employ a formal *Wright Line* analysis, and therefore that her conclusions are legally erroneous. This argument focuses on the form of *Wright Line* and ignores its substance. *Wright Line* established an affirmative defense for employers charged with violations of the NLRA. After employees show a prima facie violation, the employer may escape liability by proving that the action against employees would have occurred, for legitimate business reasons, even in the absence of anti-union sentiment. *Transportation Management,* 462 U.S. at 401-02. In this case, the ALJ found not only that Turnbull had failed to meet this burden of proof; she affirmatively found that the discharges in question were motivated by anti-union animus. This finding, which we find was supported by substantial evidence, *necessarily rejected Turnbull's proffered business justification defense.* Accordingly, if there was error in failing to follow the burden-shifting procedures outlined in Wright Line, the error was harmless, since *the ALJ at least found that Turnbull had failed to prove its affirmative defense.* (Emphasis added)

The Sixth Circuit has, by its decision, condoned a perversion of the *Wright Line* and *Transportation Management* shifting burdens whereby the Board's initial proof is deemed dispositive, effectively depriving the employer of an opportunity to show that notwithstanding the alleged illegal motivation the personnel action would have occurred. Note that the ALJ here accepted as the root of her decision the proposition that twenty-one of the twenty-eight Charging Parties laid-off in July, 1981 were chosen for layoff because of anti-

union bias.[10] This satisfies the General Counsel's initial burden Section 10(c) of the Act. The employer for its part proved that layoffs were inevitable (predating union activity by a wide margin) and that such criteria as trainability, productivity, dependability, etc. were used in reassigning employees to positions (e.g. on the fourth floor) subject to the impending reduction-in-force. The ALJ did not find this proffer to be pretextual. As noted *supra* she agreed that layoffs were planned and unrelated to later union activity. The Sixth Circuit contends that she found instead that the employer failed to carry its burden by finding that the Charging Parties *were chosen for layoff because of anti-union bias. But that's what was accepted as a prima facie case,* on behalf of the General Counsel, not rebuttal of the employer's showing of an affirmative defense under *Wright Line* and *Transportation Management.* The Sixth Circuit by confusing "substance" and "form" has returned the Court to a pre-*Wright Line* posture, where an employer's affirmative defense is without legal meaning or value.

The error in analysis is especially dramatic when considering the second layoff, i.e., of the entire second shift on July 22nd. The ALJ concludes that Turnbull's decision to terminate all persons working on the extra shift, which shift had been hired to meet peak production requirements, was discriminatory because ". . . it would appear more natural that Respondent would select for separation the least desirable employees, regardless of shift. . ." (D-83, lines 16-18). Thus did the ALJ accept the General Counsel's burden. But Turnbull introduced uncontroverted evidence that (1) inventory had increased sufficiently that the extra shift was not needed, and (2) that it was uniformly the employer's practice

10. Without however any proof being adduced that the employer knew of or suspected union activity by eleven of the Charging Parties.

to lay off extra shifts, and not to reassign employees willy-nilly from day to night or vice versa. If, assuming arguendo, Turnbull had known of union activity by every one of the second shift employees, and had acted on that knowledge, consciously terminating each one because of their union activity, *there still would be no violation* if Turnbull, *as it in fact did,* proved the layoff would have occurred in any event. The Sixth Circuit confusing substance and form would stop at the first question and conclude that a positive answer "necessarily" rejects the employer's proof. Such a result conceptually makes a travesty of *Wright Line.*

Such a result is also directly contrary to the precedent found in every other circuit. Without belaboring the point, every other Court of Appeal in a "dual motive" case has allowed the respondent to adduce proof in avoidance and defense of the General Counsel's *prima facie* case. *N.L.R.B. v. Horizon Air Services,* 761 F.2d 22 (1st Cir. 1985); *Allbritton Comm. Co. v. N.L.R.B.,* 766 F.2d 812 (3rd Cir. 1985); *N.L.R.B. v. Nueva Engineering,* 761 F.2d 961 (4th Cir. 1985); *N.L.R.B. v. Bliss & Laughlin Steel Co., Inc.,* 754 F.2d 229 (7th Cir. 1985); *N.L.R.B. v. Searle Auto Glass, Inc.,* 762 F.2d 769 (9th Cir. 1985); *N.L.R.B. v. So. Fla. Hotel,* 751 F.2d 1571 (11th Cir. 1985) and *Passaic Daily News v. N.L.R.B.,* 736 F.2d 1543 (D.C. Cir. 1984).

Such proof necessarily has to be found pretextual *(Bliss & Laughlin Steel, supra),* insufficient *(Horizon Air Service, supra),* or sufficient as an affirmative defense *(Neuva Engineering, supra).* But in *no case* has any Circuit Court of Appeals, as here, cited the General Counsel's *prima facie* showing as dispositive, in and of itself, in rejecting the respondent's showing. To do so makes a sham of *Wright Line* and this Court's decision in *Transportation Management.*

A writ must and should be issued to correct this departure from important federal precedent.

THE CONSOLIDATION OF CASES AND ISSUANCE OF A PROLIX ADMINISTRATIVE DECISION PREVENTED EFFECTIVE JUDICIAL REVIEW AND THEREBY VIOLATED THE RESPONDENT'S RIGHT TO JUDICIAL DUE PROCESS.

The Administrative Law Judge herein issued a ninety-three page order, with single-spaced type, in three separate N.L.R.B. cases against the Turnbull Cone Baking Company. Because of the nature of that decision, a carefully undertaken review was in order. This was not possible because of the verbosity and tortuous manner in which the decision was written. The Sixth Circuit of the United States Court of Appeal following oral argument issued a brief eight and one-half page opinion.[11]

The "clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure governs appellate review of facts. A reviewing court is bound by the findings of fact unless those findings are clearly erroneous. Reviewing courts have not hesitated to remand cases for more specific findings when the decisions lacked sufficient factual information to permit application of the "clearly erroneous" test. *Sylvester v. Callon Energy Servs.*, 724 F.2d 1210, (5th Cir. 1984). Administrative law cases where there were insufficient or no facts set forth as a basis for the decision have been

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11. At oral argument the three-judge panel began by expressing incredulity that appellant would expect them to review in detail the convoluted ninety-three page decision before them on a question of "substantial evidence."

called violative of due process.[12] *Northern California Power Agency v. Morton,* 396 F.Supp. 1187 (D.D.C. 1975). There are striking similarities between these cases and the Turnbull case.

The order of the Administrative Law Judge in the instant case is impossible to follow. Precise findings are hidden or missing altogether in the lengthy statement of superfluous facts. As a specific example, the ALJ denied claims by six of the Charging Parties because there was no evidence that the employer knew or suspected them of union activity (D-79, lines 25-33). But there was similarly no evidence as to eleven other employees the ALJ ordered reinstated. This error was argued to the Board and then to the Sixth Circuit, but presumably because of the practical impossibility of testing that claim by winnowing findings in a ninety three single-spaced opinion, neither reviewing body ruled on the error.

It is the contention of Turnbull Cone Baking Company that such a profusely detailed, copious and labyrinthine N.L.R.B. order, not properly reviewed, is much akin to an opinion without reasons for judgment. In the one instance, one cannot see the forest for the trees; in the other, there simply are no trees. The Administrative Law Judge was to show the path through the forest, but she has merely demonstrated that there are trees in the woods. Turnbull was denied due process of law in the same fashion as had the Judge given no basis for her ruling.

The Fifth Amendment applies to action taken by the

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12. *Accord, Garney v. Freeman,* 397 F.2d 600 (10th Cir. 1968), where the court stated that "...factual determinations are not final and conclusive unless relevantly supported by the record – an administrative order without factual support is without due process."

federal government and its agencies. *Public Utilities Commission v. Pollak,* 343 U.S. 451, (1952). Fifth Amendment procedural due process has been held to apply to N.L.R.B. cases. U.S. Const. amend. V; *Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir. 1976). Administrative due process must be found in the administrative record. *Garvey v. Freeman,* 397 F.2d 600 (10th Cir. 1968). The threshold inquiry which must be made is whether the agency action has deprived a person of an interest in property or liberty. *Board of Regents v. Roth,* 408 U.S. 564, (1972). In the instant case, the Judge's decision, if enforced, will not only deprive the Turnbull Cone Baking Company of property. The deprivation will be so extreme as to force this small business into bankruptcy.

A determination that a due process liberty or property right has been violated does not determine the amount or type of process that is constitutionally required. Due process is a flexible concept and its procedural requirements vary depending upon the specific deprivation. *Morrissey v. Brewer,* 408 U.S. 471, (1972); *Orloff v. Cleland,* 708 F.2d 372 (9th Cir. 1983); *Old Dominion Dairy v. Secretary of Defense,* 631 F.2d 953 (D.C. Cir. 1980). Due process, to be effective, must be accorded at a meaningful time and in a meaningful manner. *Blackhawk Mining Co. v. Andrus,* 711 F.2d 753 (6th Cir. 1983); *Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir. 1976). The determination of what procedures are required to satisfy due process depends on an analysis of the particular case in accordance with a three-part balancing test. *Matthews v. Eldridge,* 424 U.S. 319, (1976); *Orloff v. Cleland, supra; Old Dominican Dairy v. Secretary of State, supra.* The facts that must be considered are:

1. The private interest that will be affected by official action;

2. The risk of an erroneous deprivation of that interest through the procedure used; and

3. The fiscal and administrative burdens that any additional procedural requirements would entail.

Application of these principles to the Turnbull Cone Baking Company situation compels the conclusion that the decision issued by the Administrative Law Judge and the Sixth Circuit review of same, taken together, are violative of due process. First, the extensive and adverse effect of the government action would destroy the company if the Judge's decision is permitted to stand.[13] Turnbull's deprivation of property would be based on an improperly drawn decision, followed by a necessarily deficient review. Lastly, the minimal requirement that the Administrative Law Judge issue concise and to the point decisions, which could then be adequately reviewed, would add insignificant fiscal and administrative burdens on the agency or court. Certainly Turnbull's private interest is of sufficient magnitude to overcome the government's interest.[14]

The essence of due process is "fundamental fairness." *Galvan v. Press,* 347 U.S. 522, (1954); Evans v. Wilderson, 605 F.2d 369 (7th Cir. 1979). The Byzantine approach of the Administrative Law Judge in this case has led to a randomly confusing decision which is anything

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13. *Accord, Old Dominion Dairy v. Secretary of Defense,* 631 F.2d 953 (D.C. Cir. 1980), where the economic life of a government contractor was in jeopardy due to agency action.

14. *Compare, Blackhawk Mining Co., Inc. v. Andrus,* 711 F.2d 753 (6th Cir. 1983).

but fair to Turnbull. The range of the decision was far too wide to permit application of the proper review standard by the appellate court. The application of the standard in a meaningful manner was not attempted in any event by the Sixth Circuit. The appellate court was under a duty to review the fairness of the N.L.R.B. decision. The courts have held that there is no escape from a careful examination of the record to enable the reviewing court to meet its responsibility "for reasonableness and fairness of Labor Board decisions." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1952); *Home Town Foods, Inc. v. N.L.R.B.*, 416 F.2d 392 (5th Cir. 1969). The Sixth Circuit did not meet its duty in this case and its cursory review is a continuation of the failure to provide due process of law for Turnbull. The courts have held that the findings of the N.L.R.B. are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeal precludes the Board's order from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. *Universal Camera Corp. v. N.L.R.B., supra.* Here, the broadly haphazard decision by the ALJ is justified by nothing in the administrative record and should have been at least thoroughly reviewed by the appellate court. The necessity for adequate independent judicial review of administrative action has been amply set forth by this Honorable Court in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 74 (1936), as follows:

> "When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, *provided the requirements of due process which are specially applicable to such an agency are met,* as in according a fair hearing and acting upon evidence and not arbitrarily.

[Citation omitted.] In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power . . . Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for

> reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. [Emphasis added.]

Judicial review has two primary functions — that of imprinting governmental action with the stamp of legitimacy, and that of checking the various branches of government when these encroach on ground forbidden to them by the Constitution as interpreted by the courts. These two functions are not independent of each other; on the contrary, they may be looked upon as different aspects of the same function. In the Turnbull case, the Sixth Circuit should not have legitimized the rambling N.L.R.B. order by its affirmation. The court failed in its duties to determine fairness to Turnbull and to curb the agency violation of due process.

CONCLUSION

A Writ of Certiorari must and should issue to the Court of Appeal for the Sixth Circuit in this case because (a) there has been grievous error in application of the proper burdens of proof, and (b) judicial review in the first instance has been denied the respondent employer by issuance of a non-reviewable administrative decision, all in violation of respondent's constitutional right to due process.

Respectfully submitted this the _____ day of March, 1986.

WALKER, BORDELON, HAMLIN & THERIOT

By: _____
DAVID E. WALKER
701 S. Peters Street
New Orleans, Louisiana 70130
(504) 524-5328

ATTORNEYS FOR TURNBULL CONE BAKING COMPANY OF TENNESSEE

85 - 1505

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1986

NO.

TURNBULL CONE BAKING COMPANY
OF TENNESSEE

Petitioner

VERSUS

NATIONAL LABOR RELATIONS BOARD

Respondent

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

David E. Walker
WALKER, BORDELON, HAMLIN
& THERIOT
701 South Peters Street
New Orleans, Louisiana
Telephone: (504) 524-5328

ATTORNEYS FOR PETITIONER

HAUSER PRINTING COMPANY, INC., 5720 HEEBE STREET, HARAHAN, LA. 70123

APPENDIX A

TURNBULL CONE BAKING COMPANY OF TENNESSEE

VERSUS

NATIONAL LABOR RELATIONS BOARD

No. 84-5930/6035

December 11, 1985

Nos. 84-5930/6035

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TURNBULL CONE BAKING COMPANY OF TENNESSEE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Cross Application to Enforce a Decision of the National Labor Relations Board.

Decided and Filed December 11, 1985

Before: MERRITT and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM. The Turnbull Cone Baking Company (Turnbull) seeks review of the decision of the National Labor Relations Board (NLRB) finding violations of sections 8(a)(1), (3), and (4) of the National Labor Relations Act and instructing Turnbull to reinstate twenty-three employees with back pay. The NLRB cross-applies for enforcement of its order. After studying the record and the arguments of the parties, we conclude that there is substantial evidence to support the Board's findings of fact and that there are no errors of law in its decision. Accordingly, we grant enforcement of the Board's order without modification.

I.

The facts of this case are well documented in the lengthy opinion of the administrative law judge (ALJ). Briefly, Turnbull had legitimate reasons to decrease the size of its workforce when it streamlined operations and moved into a new plant. In preparation for these changes, Turnbull began to evaluate and re-train its employees. During this time a union organizing campaign began, which alarmed Turnbull. Its reaction to this campaign gave rise to the liability at issue here. Supervisors cautioned employees that participating in the campaign would bring adverse consequences, such as discharge, and warned them that the company might close. When management personnel saw employees visit the organizers' van, which was parked across the street from the company, the managers recorded this information in journals or internal memoranda. Notations were also made regarding the substance of employee conversations. such as a notation that an employee had been

"talking union" during her break time. Supervisors also questioned employees about whether they had signed union authorization cards.

In addition, there was testimony, credited by the ALJ, that when a manager was asked by an employee why she was being laid off when employees with lower qualifications were retained, the manager responded that the laid-off employee had signed a union authorization card. There was also testimony, again credible, that after another employee's query regarding her layoff, the employee was asked whether she had signed a union card. At the first meeting of Turnbull employees at the union hall, a Turnbull manager was seen driving slowly back and forth in front of the hall. Several employees and employees' cars were visible to passing traffic. Shortly thereafter, there was a second wave of layoffs, despite management's assurances that the layoffs had ended. The remaining employees were then required to work overtime. Charges against Turnbull were filed with the NLRB.

As the hearing date approached, employee Raborn informed his manager that he was being called to testify for the General Counsel. One of the supervisors told an employee that Raborn would lose his job because he was testifying and was suspected of informing about company actions. A note was put in Raborn's file that he had been talking to another employee about the union. Raborn testified, and his union authorization card was admitted into evidence. Turnbull then transferred Raborn to the third shift and increased his workload. After four days, Raborn was discharged, ostensibly for poor performance and lack of cooperation.

Prior to his discharge, Raborn and employee Sum-

mers, who was also summoned to testify at the hearing, were seen conversing with employee Broadwell, who sometimes worked next to them. Broadwell was cautioned by her supervisor not to talk to Raborn and Summers frequently, because Broadwell was being watched by their manager, who suspected that Raborn and Summers were discussing the union with Broadwell. The manager later acknowledged concern about the union activities of Raborn and Summers, and instructed Broadwell not to speak at all to the pair, not even the slightest greeting. Eventually Broadwell protested this rule with some anger and vehemence. She was discharged for insubordination.

II.

Turnbull asserted legitimate reasons for its selection of employees for layoff and for the discharges, such as poor quality or quantity of work, poor attitude, poor attendance, inability or reluctance to operate the new equipment, and insubordination. The ALJ considered each justification offered by Turnbull and found each one pretextual.

Where testimony conflicted, the ALJ made detailed credibility findings. These findings were based on demeanor, internal inconsistency of a witness's testimony, inconsistencies between the testimony of witnesses, and on Turnbull's failure to produce readily available documentation that would support an assertion. For example, Turnbull did not produce the performance evaluations that it completed shortly before the organizational campaign began, despite the fact that it asserted that certain employees were selected for the layoff on the basis of poor performance. Similarly, Turnbull did not produce time and payroll records to support other assertions that were disputed.

The ALJ concluded that Turnbull violated section 8(a)(1) of the NLRA by threatening employees with possible discharge, threatening to close the plant if the employees chose a union, interrogating employees about union activities, engaging in surveillance of a union meeting, imposing a discriminatory rule against conversation, and retaliating against an employee for testifying at an NLRB proceeding. The ALJ further concluded that Turnbull violated sections 8(a)(1) and (3) by choosing twenty-three employees for layoff and discharge on the basis of real or suspected union activities. In addition, the ALJ found that Turnbull also violated section 8(a)(4) in discharging Raborn. The ALJ found that in regard to six employees, there was insufficient evidence to show discriminatory treatment. The remedy included reinstating twenty-three employees with back pay.

On review by the Board, the ALJ's rulings, findings, conclusions and order were adopted in their entirety. The Board ordered Turnbull to take the actions set forth in the ALJ's order.

III.

Before addressing the merits of the parties' arguments, we note that the scope of our review is limited. A reviewing court may not disturb the Board's findings of fact where there is substantial evidence on the record considered as a whole to support the Board's findings. 29 U.S.C. § 160(e), (f); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Board's findings must be set aside when the record demonstrates that the Board's decision is not "justified by a fair estimate of the worth of the testimony of witnesses" or by the Board's "informed judgment on matters within its special competence or both." *Universal Camera*, 340

U.S. at 490. When there is a conflict in the testimony, "it is the Board's function to resolve questions of fact and credibility," and thus this court ordinarily will not disturb credibility evaluations by an ALJ who observed the witnesses' demeanor. *NLRB v. Baja's Place,* 733 F.2d 416, 421 (6th Cir. 1984).

The Board's application of the law to particular facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo. NLRB v. United Insurance Co.,* 390 U.S. 254, 260 (1968); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951). Evidence is considered substantial if it is adequate, in a reasonable mind, to uphold the decision. *Universal Camera,* 340 U.S. at 477. The appellate court should consider the evidence contrary to the Board's conclusions, but may not conduct *de novo* review of the record. *Union Carbide Corp. v. NLRB,* 714 F.2d 657, 660 (6th Cir. 1983).

If the Board errs in determining the proper legal standard, the appellate court may refuse enforcement on the grounds that the order has "no reasonable basis in law." *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979).

Section 7 of the Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Section 8(a)(1), 29 U.S.C. § 158(a)(1), provides that it "shall be an unfair practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits employers from discriminating against employees to discourage union membership. Section 8(a)(4), 29 U.S.C. § 158(a)(4), prohibits employer discrimination against employees for giving testimony before the Board.

It is well settled that an employer violates the Act by coercively interrogating its employees about their union activities, *NLRB v. E. I. DuPont De Nemours*, 750 F.2d, 524, 527 (6th Cir. 1984), by threatening loss of jobs for engaging in union activities, *NLRB v. Price's Pic-Pac Supermarkets*, 707 F.2d 236 (6th Cir. 1983), and by maintaining surveillance of employee union activities. *NLRB v. Garon*, 738 F.2d 140, 143 (6th Cir. 1984).

In addition, an employer violates the Act by implementing a rule to inhibit employees' union activities, *Price's Pic-Pac Supermarkets*, 707 F.2d at 237, or by imposing a rule to restrict discussion of union matters. *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983). As a matter of causation, there can be no finding of discrimination based on an employee's engaging in a protected activity unless the employer was aware of or suspected the employee's activity. *See A to Z Portion Meats v. NLRB*, 643 F.2d 390, 393 (6th Cir. 1981).

Although there is no doubt that an employer commits an unfair labor practice when it discharges an employee for engaging in protected activities and gives pretextual reasons for the discharge, an employer's actions are not unlawful if his anti-union animus did not contribute to the discharge. *NLRB v. Transportation Management*

Corp., 462 U.S. 363, 398 (1983). Accordingly, once the General Counsel has demonstrated that the employee's protected activity was a substantial or motivating factor in the adverse action, the employer may then avoid liability if it can prove by a preponderance of the evidence that there were independent, legitimate reasons for the decision. *Id.* at 398-401. Thus, in a mixed motive or dual motive case, where there is both anti-union animus and a legitimate non-discriminatory reason for the adverse action, the burden of proof shifts to the employer to prove that the adverse action would have occurred in any event for the valid reasons stated. *Id.* at 400-03 (approving this allocation of the burden of proof in mixed motive cases, which was set forth by the Board of *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)).

Turnbull argues before us, as it did before the NLRB, that the sole criterion in each case for selecting an employee for layoff, dismissal was a lawful reason, such as quality or quantity of work, attitude, availability of jobs in the new plant that matched the employee's skill and training, or whether the employee happened to be a member of a shift that was discontinued. In contrast, the Board claims that the sole motivating factor was the employee's involvement in the union's organizing campaign. The ALJ appears to have credited aspects of both contentions, in that she acknowledged a legitimate motive for discharging *some* workers (the move to the new plant), but found that the workers actually terminated or laid-off had been selected for illegal reasons (their real or suspected union activity).

Turnbull's argument for reversal on this point is that the ALJ failed to employ a formal *Wright Line* analysis, and therefore that her conclusions are legally erroneous.

This argument focuses on the form of *Wright Line* and ignores its substance. *Wright Line* established an *affirmative* defense for employers charged with violations of the NLRA. After employees show a prima facie violation, the employer may escape liability by proving that the action against employees would have occurred, for legitimate business reasons, even in the absence of anti-union sentiment. *Transportation Management*, 462 U.S. at 401-02. In this case, the ALJ found not only that Turnbull had failed to meet this burden of proof; she affirmatively found that the discharges in question were motivated by anti-union animus. This finding, which we find was supported by substantial evidence, necessarily rejected Turnbull's proffered business justification defense. Accordingly, if there was error in failing to follow the burden-shifting procedures outlined in *Wright Line*, the error was harmless, since the ALJ at least found that Turnbull had failed to prove its affirmative defense.

Tutnbull next argues that there was insufficient evidence of its anti-union animus or its awareness of certain employees' union activities. It further argues that the ALJ erred in crediting the testimony of a single interested party, an employee, over the testimony of supervisors.

The Board may rely on all the evidence, including direct admissions as well as circumstantial evidence, in determining actual motive. *Dupont*, 750 F.2d at 529. Circumstantial evidence alone may be sufficient. *Id. NLRB v. Price's Pic-Pac Supermarkets, Inc.* 707 F.2d 236, 240 (6th Cir. 1983). Anti-union motivation may reasonably be inferred from a variety of factors, such as a company's expressed hostility towards unionization together with knowledge of the employees' union activities, *Dupont*, 750 F.2d at 529; *NLRB v. Supreme*

Bumpers, Inc., 648 F.2d 1076, 1077 (6th Cir. 1981), proximity in time between the employees' union activities and their discharges, *Dupont*, 750 F.2d at 529, *NLRB v. Garon*, 738 F.2d 140, 147 (6th Cir. 1984), the inconsistencies between the proffered reason and other actions of the employer, *NLRB v. Evans Packing Co.*, 463 F.2d 193, 195-96 (6th Cir. 1972), and disparate treatment of certain employees compared to other employees with similar work records of offenses. *Supreme Bumpers*, 648 F.2d at 1077. Furthermore, where an employer's representatives have announced an intent to discharge or otherwise retaliate against an employee for engaging in protected activity, the Board has before it especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated. *NLRB v. Armstrong Circuit, Inc.*, 462 F.2d 355, 356 (6th Cir. 1972) (supervisor's statement that discharge was related to union activities); *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980) (finding that statement of anti-union motive eliminates question concerning validity of proffered legitimate reason for adverse action).

In *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 662 (6th Cir. 1983), this court indicated that the reliability of the uncorroborated testimony of an interested witness is open to question where it is directly contradicted by the testimony of a disinterested witness. It appears, however, that the management personnel here may not have been completely disinterested, and we find, moreover, that the ALJ's credibility findings are consistent with a reasonable reading of the record. *See NLRB v. Publishers Printing Co.*, 650 F.2d 859, 860 (6th Cir. 1981) (Board may credit discriminatee's self-serving and uncorroborated testimony; manager's contrary testimony may be equally self-serving); *L'Eggs Products*, 619 F.2d at 1343 (same). Accordingly, we find no basis

for overturning the credibility determination of the ALJ. We likewise find, in regard to the question of sufficiency, that the determinations of the Board are supported by substantial evidence.

In sum, we hold that the decision of the Board was supported by substantial evidence and that the Board committed no errors of law. We therefore grant enforcement of the Board's order without modification.

APPENDIX B

271 NLRB No. 203

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

TURNBULL CONE BAKING COMPANY OF TENNESSEE

Case 10–CA–17282

and

LOCAL LODGE 56 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case 10–CA–18157

and

NELLA BROADWELL, an individual

Case 10–CA–181888

and

MARK A. RABORN, an individual

DECISION AND ORDER

On 30 December 1982 Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. [1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

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1. The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

   The Respondent asserts that the judge's posthearing demand for identification by name of those discriminatees who cast challenged ballots in the representation election evidenced bias and highly prejudicial conduct. In this connection the respondent asserts that by requesting such detailed information the judge appears to have been able to use this information in her decision as to the alleged violations of Sec. 8(a)(3) of the Act because she found merit in allegations concerning a sufficient number of discriminatees to reverse the results of the election in Case 10–RC–12475.

   We find no merit to the Respondent's exception. It is clear from correspondence between the judge and the parties that the judge sought such information for the purpose of determining whether to grant or deny the General Counsel's motion to consolidate Cases 10–CA–18157 and 10–CA–18188 with Case 10–CA–17282. Indeed, in granting the General Counsel's motion to consolidate, the judge noted that a final tally in the representation case involved in Case 10–CA–17282 could not be determined without resolving the issue of the discriminatory discharges of employees Nella Broadwell and Mark Raborn alleged in Cases 10–CA–18157 and 10–CA–18188. Under these circumstances, we find no evidence of prejudice and bias in the judge's request or subsequent conduct, and accordingly find no merit to the Respondent's exception.

   Chairman Dotson does not find that the Respondent unlawfully observed the union meeting on 12 July 1981. He considers the evidence insufficient to establish that Supervisor Food's driving past the union hall constituted surveillance.

2. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Turnbull Cone Baking Company of Tennessee, Chattanooga, Tennessee, it officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.[3]

Dated, Washington, D.C. 31 August 1984.

Donald I. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

3. Our notice includes language corresponding to the judge's finding that the Respondent unlawfully discharged an employee because he have testimony under the Act.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TURNBULL CONE BAKING COMPANY OF TENNESSEE [1]

and

LOCAL LODGE 56 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case 10–CA–17282

TURNBULL CONE BAKING COMPANY OF TENNESSEE

and

NELLA BROADWELL, An Individual

Case 10-CA-18157

TURNBULL CONE BAKING COMPANY OF TENNESSEE

and

MARK A. RABORN, An Individual

Case 10-CA-18188

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1. The Respondent's name appears as amended at the hearing.

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UNITED STATES OF AMERICA
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TURNBULL CONE BAKING COMPANY OF TENNESSEE

and

MARK A. RABORN, An Individual

Case 10-CA-18188

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1. The Respondent's name appears as amended at the hearing.

***Stephen D. Hise, Esq.*, of Atlanta, GA,**
for the General Counsel.
***David E. Walker, Esq.*, of New Orleans, LA,**
for Respondent
***Mr. Eugene Christian*, of Chattanooga, TN,**
for the Union.

DECISION

Statement of the Case

NANCY M. SHERMAN, Administrative Law Judge: These cases were heard before me in Chattanooga, Tennessee, on April 13 and 26-29, 1982, and August 26, 1982. The charge in Case No. 10-CA-17282 was filed on August 6, 1981, and amended on September 11, 1981; the complaint therein was issued on September 25, 1981, and amended on March 8, 1982. The charges in the other two cases were filed on May 12 and 24, 1982, and the complaint in these cases was issued on June 22, 1982. These three consolidated cases present the question of whether Respondent Turnbull Cone Baking Company of Tennessee violated Section 8(a)(1) of the National Labor Relations Act, as amended ("the Act"), by interrogating and threatening employees regarding their activity on behalf of Local Lodge 56 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"); by engaging in surveillance over their union activity; by threatening that employees would be discharged if they gave testimony in Board proceedings; and by promulgating a rule prohibiting employees from engaging in union or protected concerted activities. Also presented is the question of

whether Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written reprimand to employee Mary Zackery; by separating Zackery and 18 other persons on July 10, 1981; by separating 9 more persons later that month; and by discharging employee Nella Broadwell on April 22, 1982. A further question presented is whether Respondent violated Section 8(a)(3), (4) and (1) of the Act by discharging employee Mark Raborn on May 12, 1982.

Or the basis of the entire record,[2] including the demeanor of the witnesses, and after due consideration of the brief filed by Respondent and the two briefs filed by counsel for the General Counsel ("the General Counsel"), I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent is a Tennessee corporation with an office and place of business located at Chattanooga, Tennessee, where it is engaged in the manufacture, sale, and distribution of ice cream cones. During 1980 and 1981, representative periods, Respondent annually sold and shipped from its Chattanooga plant finished products valued in excess of $50,000 directly to customers located outside Tennessee. I find that, as Respondent

2. During the August 26, 1982, hearing day, a prehearing affidavit by company vice president Wayne W. Turnbull was marked as Respondent's Exhibit 34, but never offered. Later that day, and in post-hearing correspondence between the parties, arrangements were made for the receipt into evidence of Mark Raborn's timecards for the last 2 weeks of his employment. When I received the exhibit folder in September 1982, these timecards were included therein as Respondent's Exhibit 34. As a matter of clarification, these timecards are received in evidence as Respondent's Exhibit 34.

concedes, Respondent is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

1. The Turnbulls' business interests and labor relations history

For a number of years, members of the Turnbull family have operated two ice-cream-cone plants. One of these plants is operated by the Turnbull Cone Baking Company of Louisiana, Incorporated ("Turnbull-Louisiana"), in New Orleans, Louisiana. In October 1976, a local union affiliated with the Bakery Workers was certified as the bargaining representative for the production and maintenance employees at that plant. Turnbull-Louisiana initially refused to honor that certification, and this refusal inferentially continued until after an April 1977 Board bargaining order was enforced by the United States Court of Appeals in March 1978. 229 NLRB 313, enfd. 84 L.C. para. 10, 645 (C.A. 5). Thereafter, a contract was agreed to, Counsel for the General Counsel and counsel for Respondent both state that this certified local disclaimed representation in early 1982 (see page 30 of the transcript and page 2, fn. 1, of Respondent's brief).

The Respondent herein began manufacturing operations in Chattanooga in about 1910. Until late 1981, its manufacturing operations were conducted in two

buildings (one erected about 1923 and the other about 1950) located on Carter Street.

2. The decision to build a new plant

In the latter part of the 1970's, Respondent's business became unprofitable.[3] On an undisclosed date prior to October 15, 1980, Greg Overton (who at that time was Respondent's vice president, general manager, and chief Chattanooga operating officer) sent a memorandum to Respondent's board of directors (including Wayne Turnbull) in which Overton recommended the construction of a new plant because, *inter alia*, "we would reduce our work force by approximately seven women and two men."

Wayne Turnbull testified that Respondent's Exhibit 10 is the minutes of a meeting of Respondent's board of directors on October 10, 1980. This document, which was received in evidence without objection, sets forth a decision to build a new production and warehouse facility "in order to have the business grow and prosper." Also set forth is authorization to Overton to acquire the necessary property, to obtain construction bids for the building, and to arrange for the necessary financing. Turnbull testified that he attended all the meetings of the board of directors during this period, but the October 10 minutes' list of persons present does not include his name. Turnbull further testified that Respondent's Exhibit 11 was submitted to the board of directors "during the October presentation." Respondent's Exhibit 11 states that a change from the existing

3. Turnbull testified that in 1980, Respondent had an $8,000 operating profit on approximately $3,000,000 worth of sales. Before the hearing, he approved a representation to the Regional Office that Respondent has a net profit of $9,902.82 on sales of $2,779,000.

four-floor operation to a one-floor operation would "save" about 10 women and about 12 men on the first shift, and 8 women and about 10 men on the second shift.

The laws of the State of Tennessee authorize municipalities to set up public corporations "to finance . . . properties to the end that such corporations may be able to maintain and increase employment opportunities . . ." Such municipalities are authorized "to vest such corporations with all powers that may be necessary to enable them to accomplish such purposes." The statute goes on to state "that the means provided by this chapter are needed to relieve the emergency created by the continuing migration from Tennessee of a large number of its citizens in order to find employment elsewhere . . ." Section 7-53-102. Pursuant to the foregoing statute, the City of Chattanooga has established the Industrial Development Board of Chattanooga ("IDB"), which is authorized to issue tax-free industrial revenue bonds or notes.

On August 15, 1980, the four persons who comprised the board of directors of both Turnbull-Louisiana and Respondent (including Wayne Turnbull, who at that time was both corporations' treasurer, and Overton, who at that time was both corporations' vice president) authorized Overton to attempt to obtain a $950,000 tax-free industrial bond from the IDB, and to pledge Turnbull-Louisiana's property and buildings as collateral to the First Tennessee Bank in Chattanooga if it purchased that bond. Also, Overton was authorized to obtain blueprints for a proposed new plant to be operated by Respondent.

By letter to the IDB dated November 4, 1980, Over-

ton requested the issuance of $1 million worth of tax-free industrial revenue bonds or notes to be used primarily for the purchase of land and the construction of a new manufacturing facility to replace Respondent's current facilities. The letter stated, *inter alia*, that with the new facility and a projected increase in sales, "we estimate that our employment will increase by fifteen to twenty people." The letter further stated that First Tennessee Bank had committed itself to purchasing the entire issue; that conventional financing was not a "viable option" because of current interest rates; and that if the request for tax-free bonds was denied, Respondent's "only alternative" was to stay in the present location and stop accepting new business. The letter further stated, "Based on our current projections, we will reach our maximum capacity during 1981."

On November 5, 1980, at a special IDB board of directors' meeting, Overton stated, *inter alia*, that 15 to 20 new jobs would be created in the new plant, "which will allow for a 50% increase in present production." By letter dated November 20, 1980, First Tennessee Bank confirmed its intent to purchase the proposed $1 million revenue bond to provide financing for Respondent.

At a special meeting of the IDB board of directors on November 21, 1980, Overton stated that at the previous meeting, Respondent had requested a $1 million bond issue to finance the "expansion" of its cone-baking business. The board of directors unanimously authorized the execution of a "Memorandum of Agreement" which set forth an IDB undertaking to issue a $1 million tax-free revenue bond for Respondent's construction of a new commercial bakery in Chattanooga, and an undertaking by Respondent to pay the principal and interest on the bond. The IDB authorizing resolution stated, *inter*

alia, that the board of directors "has made the findings of public purpose and other findings contained in the Memorandum of Agreement." This "Memorandum," executed that same day by Overton (on Respondent's behalf) and by the IDB's chairman and secretary stated, *inter alia:*

> 1. Preliminary Statement. — Among the matters of mutual inducement which have resulted in this Agreement are the following:
>
> * * *
>
> (c) The proposed financing will contribute to increased employment opportunities and/or prevent the loss of currently exisiting employment in the City of Chattanooga . . .

On January 30, 1981, Respondent (through president Elizabeth Turnbull and then treasurer Wayne Turnbull) and the IDB signed an industrial development loan agreement which stated, *inter alia*, "WHEREAS, the [IDB] had determined that the proposed financing will prevent the loss of presently existing employment in Chattanooga, Tennessee." This agreement called for a $1 million loan to Respondent from the IDB at no more than 70 percent of the bank's prime rate, payable in 120 equal monthly installments beginning no later than October 15, 1981. Louisiana real estate owned by Turnbull-Louisiana was used as collateral for the loan.

A letter dated September 3, 1981, to a Board investigator from a labor consultant retained by Respondent to represent it in the investigation of the charge, states, *inter alia:*

> . . . when Greg Overton applied for the tax-free loan connected with the city bond issue,

> he learned during his investigation into how the matter should be handled that if he expected to get approval of his application it was mandatory that he include in it an indication that the new venture would result in the creation of additional jobs or his appeal would not be approved . . . it was the [IDB's] policy not to lend money for automation that would result in the loss of jobs and while they knew that was our intention they indicated we should not give out that information for publication in the news media.

Wayne Turnbull's prehearing affidavit to a Board investigator affirms this letter. IDB counsel Gary D. Lander, who attended the IDB meetings where the loan to Respondent was discussed, could not recall any representation to the IDB that a new plant would result in loss of employment.

3. The taking over of the Chattanooga plant by Wayne Turnbull

On January 5, 1981, in consequence of a dispute with Respondent's board of directors regarding Overton's desire gradually to acquire all of Respondent's stock, Overton suddenly resigned and went into the cone business himself, taking some of Respondent's existing and projected customers with him. His duties were immediately assumed by Wayne Turnbull, the son of the founder of both Turnbull-Louisiana (where Wayne Turnbull had worked for the preceding 20 years) and Respondent. Later that month, the First Tennessee Bank signed a bond agreement to finance the new plant, and paid Respondent the sums called for by the bond. Turnbull thereafter rehired a sales manager, Rick Sander-

bach, who began to work for Respondent in April 1981. It turned out that Overton kept two of the three new customers he had obtained for Respondent.[4]

4. Respondent's representations to the employees regarding whether they would be transferred to the new plant

About late January 1981, Turnbull called the employees together, either in a single meeting or in a meeting for each shift, and advised them that Respondent had signed the bond issue and received the money, and that Respondent was going to build a new plant. He said that everyone needed to work together like a ball team; and that Respondent was going to conduct something like a spring training camp where everyone had to learn new skills and new things to do. He stated that in order to prepare the employees for the sweeping changes which would be made when production moved from a four-floor to a one-floor building, Respondent was going to build some conveyors and tie together some cone-baking machines on the second and third floor, to tie wrapping machines together on the first floor, and to bring in a different type of taping machines. Turnbull stated that he needed all the employees and they needed him;[5] that there would be room at the new plant for all employees; that everybody had a chance to go; that the employees just had to work hard to make the effort; and that following the move, there would be

4. Respondent, through Overton, had projected that these three customers would increase Respondent's 1981 sales by about 20 percent. The only new customer which Respondent retained was expected to increase 1981 sales by about 5 percent.

5. Thus, James Hawthorne credibly testified that Turnbull said that the employees "all" had to work together to "make a go" of the new plant. However, Hawthorne concluded from Respondent's later conduct in combining machines at the old plant (see *infra*) that Respondent in fact intended to "cut back in help" when operations were moved to the new plant.

no more layoffs and the employees would work year-round. He further said that Respondent would move one floor at a time to the new plant. Also, he said that while the move to the new plant was taking place, vacations could be taken by the female employees (practically all of whom were cone packers), but the male employees (most of whom performed machine maintenance work) would have more work moving to the new plant and would have to schedule their vacations for some other period.[6]

Respondent eventually decided that the new Chattanooga plant would be built on Parmenas Road. During the second and third weeks in May 1981, Respondent drove employees in small groups over to the already-dug foundation of the new plant, explained the layout to them, and told them that they would be working in particular areas of the new plant. All the employees on the payroll were given such a tour, during hours for which they were paid. On Saturday, May 23, Respondent conducted an "open house" for all its

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6. My findings about what Turnbull said is based on a composite of credible portions of the testimony of James and Bernice Hawthorne, Evelyn Weaver, Linda Sisk, Earline Bates, Betty Baltimore, Ellen Finley, Juanita Prince, Jerry Summers, and Turnbull. To the extent inconsistent with my findings in the text, I do not accept Turnbull's denial that he said everyone was going to the new plant; or his testimony that "it was clearly understood by people in that plant from the very time that I came to Chattanooga that, in moving to a new plant, there would be layoffs. But there was also clearly enphasized to them that these layoffs would be determined on ability, attitude, potential, and attendance, and that everyone had a chance to qualify." Turnbull's prehearing affidavit subscribed to the September 3, 1981, letter to a Board investigator from Respondent's labor consultant, which letter said, *inter alia*, that Turnbull "could not level with the employees about who and how many of them would be involved when their jobs were eliminated for fear of experiencing a mass exodus of employees before he was ready to make his business-saving moves. Such a development would have left him in . . . a mess." Turnbull's prehearing affidavit states, "I did not discuss with employees the fact that all would be transferred to the new plant. In fact, I specifically avoided it. I would only tell employees that if their attendance and work record [were] good, they had nothing to worry about."

employees, and their families, at the construction site of the new plant. Employees who attended received refreshments but were not paid for their time.

5. Respondent's written internal plans, and its management meetings, regarding the transfer of employees to the new plant

About mid-February 1981, Turnbull presented to First Tennessee Bank's construction inspector a preliminary sketch which projected that upon the transfer of cone-baking machines to the new one-floor plant, fewer employees would be needed to pack the cones produced by these machines. After the move in late 1981, the machines, conveyor belts, and personnel were arranged in a manner very much like the sketch. In mid-February and during the first week in March, Turnbull, general production manager Tom Hood, production manager Betty Denton, and assistant production manager Yvonne Broadwell discussed this sketch, and plans for operating the new plant with fewer female employees than at the old plant. Beginning in February or March 1981, Turnbull, Hood, and Denton had more than one meeting about phasing out the fourth floor and having to lay people off.

6. Respondent's decision to stop manufacturing cone-baking machines and sugar roll cones, and to sell certain machines

Shortly after becoming chief operating officer in January 1981, Turnbull concluded that additional capital had to be raised to cover the total cost of setting up operations at the new plant. Management decided to stop manufacturing cone-baking machinery for 2 years, partly because Respondent had decided to sell

some of its old cone-baking machinery and did not want to compete with itself, and partly because (according to Turnbull's testimony) "we needed all of our resources, all of our machinists, and all of our energy to move into the new plant." The cone-baking machinery which Respondent initially decided to sell was its seven fountain-pack (food service) machines, which made cones to be used by retail outlets which sold them filled with ice cream. The products from such machines formed only a small and diminishing part of Respondent's sales, and no labor-saving could be effected on these machines because each of them made a different size and/or shape of cone and, therefore, would always require a cone-packer's full-time services. By February, Respondent had begun efforts to sell these machines. All of these fountain pack machines (one of which was stipulated to be inoperable) were on the fourth floor. Also on the fourth floor were two machines which manufactured the same size cake cones as a number of machines on other floors. Cake cones of this size constituted Respondent's retail line, in which Respondent manufactured cones for large supermarket chains to be sold in packages bearing the stores' respective labels. On an undisclosed date, Respondent decided to sell the two fourth-floor retail-line machines also.

In late April 1982, Turnbull testified on cross-examination that three of the machines from the fourth floor of the old plant were physically situated at the new plant, uninstalled and being offered for sale. He did not specify what kind of machines these unsold machines were: but because all but two of the nine fourth-floor machines were stipulated to be fountain-pack machines, at least one of the unsold machines must have been a fountain-pack machine. However, earlier that day, on direct examination, he testified that all seven of the fountain-pack machines had been disposed of. More

specifically, he testified that of the seven fountain-pack machines (including the inoperative one), Respondent sold five to someone named Bocero,[7] sold one in August 1981 to Derby Cone Company (which picked up its machine in a crate from the new plant in September 1981) in connection with Derby Cone's purchase of Respondent's fountain pack business, and "the rest of them we cannibalized for parts." As to when Respondent started to disassemble the seven fountain-pack machines. Turnbull testified that Respondent started cannibalization for its own purposes in March or April 1981, letter of credit covering one of the five fountain-pack machines bought by him, and in June 1981 was in the process of disassembling the fourth-floor machines. Denton testified, in effect, that as to the fourth-floor machines running on July 10, Respondent began to disassemble them about 1 p.m. on that date. Respondent did not thereafter run any of the fountain-pack machines, but did occasionally run the two fourth-floor retail-line machines.

On an undisclosed date before May 11, 1981, Respondent decided to sell its seven sugar roll cone machines. On May 11, 1981, Respondent sent to prospective customers a letter offering these machines for sale. In late May or early June, Respondent began to obtain packaged sugar roll cones from a "friendly competitor." About June 5, Respondent began to operate its sugar roll cone machines on only the first shift, rather than (as previously) on both shifts. On an undisclosed date after July 22, 1981, Respondent sold its sugar roll cone machines, which were never used in the new plant.

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7. On cross-examination, Turnbull testified that Respondent had sold, and as of April 1982 was in the process of crating, an unspecified type of machine which was to be shipped to Trinidad. It is unclear whether this machine was one of those purchased by Bocero, whose initial machine purchase had been shipped to Cartagena, Columbia.

When moving to the new plant, Respondent installed its 14 best cone machines. As of April 1982, these were the only ones operating at the new plant; no new machines had been bought.[8] Thereafter, and before the August 26, 1982, hearing, Respondent bought a new sugar roll cone machine.

7. Respondent's early recall of laid-off employees to provide a production cushion for the move; the June 1981 layoff

At the end of 1980, most of Respondent's cone-packers were in seasonal layoff status. If Respondent had not been expecting to move the plant, these employees would not have been called back until about mid-March 1981. However, Respondent expected its production to be interfered with while the move was in progress. In order to provide a production cushion for the move, Respondent arranged to rent extra storage space and began to call back its laid-off cone packers about late January 1981.

On June 2, 1981, Respondent laid off seven or eight employees. Turnbull testified that Respondent effected this layoff because Respondent did not need the production. No contention is made that this layoff was unlawful.

8. Institution of employee rating system

About early March 1981, Respondent instituted a

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8. In addition, in mid-June Respondent closed down its "partition" department, whose product would become unnecessary with the adoption of new packaging at the new plant. However, the persons who worked in this department were in the employ of someone other than the Respondent.

system for evaluating employees' work performance. Turnbull drew up an evaluation sheet with four columns which dealt respectively, on a scale of 1 to 10, with "ability," "attendance," "attitude," and "potential." Turnbull told general production manager Hood, production manager Denton, and assistant production manager Yvonne Broadwell that each of them independently was to periodically fill out an unsigned form on each employee (including floorladies and certain admitted supervisers) under his or her supervision. Turnbull testified that he developed this system in order to establish who was going to the new plant and who was not, ". . . we were trying to develop the concept that all we wanted at the new plant was the very cream of the crop"; and in order to develop the concept of different pay for different jobs. Turnbull further testified that he made a point of discussing with employees who had consistently poor ratings the fact that their ratings were poor, because he thought such discussions might cause them to try to improve their ratings, "and in many cases they did."

9. Institution of double machines and wage classes

Before Turnbull assumed responsibility for the plant, each cone packer was expected to pack only the cones produced by a single machine. Turnbull decided to "team" or "gang" certain machines on the second and third floor, so that two of them would deposit cones on a single conveyor belt, and to assign a single employee to pack the cones from both machines. Turnbull reached this decision partly "to get the people ready with the concept of change, of seeing a lot of cones coming at them at one time," partly to find out "who was really interested and willing to try new things and to learn new

skills," partly to develop new employee skills, and partly to learn what problems would be incurred at the new plant, where the product of six machines was to be deposited on a single conveyor belt.[9] About the end of March, Respondent ordered the conveyors and belts needed for this rearrangement. At about this same time, Respondent brought from the Turnbull-Louisiana plant to the Chattanooga plant some taping machines which differed from the machines previously used. On March 30, Respondent put the following notice on the employee bulletin board (emphasis in original).

> ALL EMPLOYEES:
>
> In our efforts to prepare for our new plant we are going to make the following changes in pay scale. (WE WILL NOW BEGIN PAYING ACCORDING TO WHAT IS *DONE* INSTEAD OF YEARS OF SERVICE.) This should be of a benefit to everyone since the rates will be higher and the opportunity for higher rates will be open to everyone.
>
> CLASS 1 – Machine Operators, cartoner operators, – 4.75 P.M.C. Wrapper operators, Automatic Casing Machine operators. Able to pack 2 or more Cone Machines or able to pack any type of package required. Thereby eliminating duplication of labor.
>
> CLASS 2 – Able to pack Ice Cream Cones (1 machine) – 3.95 on any pack required.

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9. He credibly restified that Respondent also hoped that this system would improve productivity in the old plant, but that it did not do so. See *infra*.

CLASS 3 – Starting rate until trained for one of the above classes. – 3.35

Also, about early April, Respondent tied its two wrapping machines in parallel lines, in order to enable the wrapping cycle to keep pace with the production cycle. About June 8, Respondent replaced these two machines with a single new wrapping machine.

Meanwhile, in April, May, and June, Respondent gave its cone packers the opportunity to work on the double machines. Management at least tried to tender such an opportunity to each employee in order of seniority. Employees were permitted to refuse to try working on double machines. It transpired that almost nobody could pack alone from a double machine all the time, and very few employees could pack alone from a double machine for a sustained period of time. Nonetheless, a number of employees were considered to have "qualified" or "seated" on a double machine, thereby classified as "Class A" or "Class 1" packers, and received wage increases to $4.75 an hour.

10. Arrangements for sanitation department at new plant

On May 29, Respondent posted a notice announcing the creation of a department of sanitation and environmental services. The notice stated, in part:

> . . . we are creating a department of sanitation and environmental services. We need someone in a supervisory capacity . . . this individual would have a working crew of 4 or 5 people to train, supervise, coordinate and be entirely responsible for all environmental ser-

> vices. . .this would be a great responsibility and we are looking for someone. . .who would be interested in growing into supervision and management responsibilities. Anyone interested please list your name below.

The at least purported signatures of eight persons appear on this notice, including Marcella Cobb, Tina Robinson, Betty Pickle, and Evelyn Cooper (the last name thereon), but not Ellen Finley or any other alleged discriminatee. Turnbull and assistant production manager Broadwell testified that all those who signed were interviewed by other members of management for this posted supervisory job; the copy of the notice received into evidence contains written notations that all these interviews occurred on June 18, except that one (Anna Doyle) may have occurred on June 29. Turnbull further testified that Cobb applied for this posted supervisory job partly because she did not do well on the double machines and realized that some of the skills were above her capability level. Broadwell testified that Cobb was selected to be the supervisor of the sanitation department. However, Turnbull testified that after the interviews were completed, Respondent decided that because none of the applicants had supervisory qualifications, Respondent would not have a separate supervisor for this newly created department, and that the department would consist of three rank-and-file employees, who would do the cleaning work after the move to the new plant. There is no evidence that Respondent made an effort to advise the employees generally that the employees to be assigned to nonsupervisory cleaning jobs at the new plant were being selected from only the employees who signed this notice. Turnbull testified that Respondent advised Cobb, Robinson, and Cooper, that they would be sharing nonsupervisory cleaning duties, and that all of them agreed about July

1 to accept these jobs. Turnbull further testified that Cobb and Robinson continued to work as cone-packers until after the move to the new building. He went on to testify that Cooper was one of the "original picks" for these sanitation jobs and that, as discussed ***infra*** Part II E 6, her acceptance of this job was the reason why she was transferred to the first shift on July 22 instead of being laid off with the rest of the second shift.[10] An internal notation by Denton, dated July 8, states that "when production allows," the "sanitation" personnel were to be Cobb, Robinson, and Pickle, and includes Cooper's name as the next to last entry in a separate list of personnel to be retained after the phaseout of the second shift. A document submitted by Respondent to the Regional Office states that as of the pay period ending July 29, 1981, Cobb, Cooper, and Robinson had the job classification "sanitation," describes Pickle as a "Class # 1" cone-packer, and lists several persons (but not Cobb or any other "sanitation" person) merely as "supervision," without specifying their departments. In April 1982, Cooper was performing various production functions.

B. *The Union Organizational Campaign before the July 1981 Separations*

About early April 1981, Mae Caldwell, who at that time was employed by Respondent on the first shift, started talking to her fellow employees about obtaining union representation. They asked her how to go about it. She said that she would ask her husband Willie Caldwell, a union member who at that time was employed elsewhere but had formerly worked for

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10. However, Turnbull's prehearing affidavit subscribed to a September 1981 letter to a Board investigator from Respondent's labor relations counsel that on July 22, Cooper was transferred to the sanitation job.

Respondent, to pick up some union cards at the union hall.

At this time, Respondent's employees included alleged discriminatee Carolyn Caldwell, who is Willie and Mae Caldwell's daughter; alleged discriminatee Dorothy White, who is Mae Caldwell's daughter and Willie Caldwell's stepdaughter; and alleged discriminatee Mary Zackery, who is Willie Caldwell's daughter-in-law.[11] Willie Caldwell frequently drove all four of these relatives to and from work in his van, which he parked on a public street in a location visible to members of management (including admitted supervisors Hood, Denton, and Yvonne Broadwell) while they were in the office. On April 16, while Willie Caldwell was parked there in his van, he induced then employee Clarence Fitzgerald, Sr., to sign a union card.[12] Inferentially thereafter, Mae Caldwell asked Fitzgerald, Sr., to campaign for the Union on the second shift, while she campaigned for the Union on the first shift.

Mae Caldwell was on vacation between about May 4 and May 8. Before she went on vacation, she told her fellow employees that upon her return, she would bring some authorization cards for them to sign. When employees expressed fear of being "identified," she told them that they did not have to let anyone else know that they had signed union cards. Mae Caldwell was discharged on May 12, for reasons not alleged to be unlawful. By this time, Fitzgerald, Sr., had also been discharged, for reasons not alleged to be unlawful. After Fitzgerald's discharge, Mae Caldwell asked alleged discriminatee James Hawthorne (also referred to in the record as "Slim") to campaign for the Union on the second shift. He began such activity about late May.

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11. Zackery retained her maiden name after her marriage.

12. Willie Caldwell testified, however, that he did not think anyone else saw this.

On undisclosed subsequent dates extending until at least the end of June, James Hawthorne, who during much or all of this period was disabled for work by an on-the-job injury, distributed union literature in a parking lot across the street from the plant. Production manager Denton testified that some time in June, she began to see Willie and Mae Caldwell sitting every day outside the production office and gathering people around them; and that she inferred, from the presence of union literature in the plant and employee reports that Willie and Mae Caldwell were signing up people for a union, that they were there to distribute such literature and obtain such signatures. About June 9 or 10, production manager Denton and assistant production manager Yvonne Broadwell approached board of directors member Ned Dowling, who was in charge of the plant in Turnbull's absence, and reported that a union was trying to organize the employees. Dowling telephoned Turnbull, who was then in New Orleans, that "we have some problems up here" and that Denton and Broadwell were "alarmed." Then, Dowling put Denton and Yvonne Broadwell on the telephone. They said that there were some "problems" at the plant, that the Machinists' Union was trying to organize. At 8 a.m. the following Monday, June 15, Turnbull came to the plant and spent the entire morning discussing the union campaign with Denton, Broadwell, and Hood. Turnbull testified, in effect, that other members of management who attended this conference identified by name some employees who were involved with the Union , but that he did not remember who they were.[13] At about this

13. My findings as to the dates of these events are based upon Turnbull's testimony that the telephone conversation occurred on a Tuesday or a Wednesday; the testimony of Turnbull, Denton, and Yvonne Broadwell that their subsequent discussion of the Union took place on the following Monday; and Denton's prehearing affidavit that the union organizational campaign was discussed in a production meeting on Monday, June 15. I do not accept Turnbull's or

same time, Denton told then floor lady Evelyn Weaver that Willie and Mae Caldwell and alleged discriminatee James Hawthorne were "giving out pamphlets and things for people to sign to get the Union in."

On June 25, while Willie Caldwell was waiting in his van in view of Respondent's office, he obtained other authorization cards from Annette Chubb and Frank Pierce, who are not among the alleged discriminatees named in the complaint; received a signed card from Evelyn Cooper (to whom he had given it on the previous day), not alleged as a discriminatee;[14] and gave a blank authorization card to alleged discriminatee Finley.[15] On the following morning, Finley went up to Willie Caldwell's van before work, and gave him her signed authorization card.[16] On Monday, June 29, while sitting in the van Willie and/or Mae Caldwell obtained signed authorization cards from alleged discriminatees Earline Bates and Athelene Hubbard.

Broadwell's testimony that these events occurred in late June. As to the content of the June 15 management discussion about the Union, except as indicated in the text I give no weight to the testimony of any of the three management witnesses who testified about it. Turnbull attributed to himself a number of statements not corroborated by either Denton or Yvonne Broadwell, and the credible evidence (much of it uncontradicted) about the subsequent conduct of Denton, Yvonne Broadwell, and Hood is inconsistent with Turnbull's alleged instructions to them.

14. As of July 29, 1981, Chubb was no longer in Respondent's employ; the record fails to show when or why she was separated. Pierce was discharged in December 1981, for reasons not shown by the record. Cooper, whom the General Counsel alleges to have been a supervisor at material times (see *infra* Part II J 1 a), was still working for Respondent in April 1982.

15. These findings are based on credible parts of Finley's and Willie Caldwell's testimony. He also testified that on this occasion, he obtained signed authorization cards from alleged discriminatees Rita Cunningham and Peggy Fitzgerald. However, as to this matter I find his memory less reliable than the memory of these two employees themselves. I accept Cunningham's testimony that she signed her card at home when he came to her home and asked her to sign it. I also accept Peggy Fitzgerald's testimony, partly corroborated by James Hawthorne, that she signed her card at his instance and returned it to him.

16. This finding is based on Finley's testimony. As to this matter, I regard her memory as more reliable than that of Willie Caldwell, who testified that she signed it at the van on June 26.

Also on June 30, upon leaving work for the day, alleged discriminatee Linda Sisk received a card from Willie and Mae Caldwell while they were sitting in the van. Sisk signed it and returned it to them. An internal memorandum in Denton's handwriting and dated July 1 states, *inter alia:*

> I was meeting in Tom Hood's office & looking out window & saw Linda Sisk talking to Mae & Willie Caldwell who are sitting outside plant everyday signing people up for union. Linda Sisk signed card. Yvonne & Tina [inferentially, floorlady Christina Robinson] & I saw her, they then stopped Sue Harvey and gave her literature.

An internal notation by Denton dated July 2, states, *inter alia,* that employee Linda Farris had told Denton that Sisk had "stopped" Farris and tried to get her to join the Union.[17]

Meanwhile, on June 25, alleged discriminatee James Hawthorne and his wife, alleged discriminatee Bernice Hawthorne, signed cards at home. That same day, he obtained signed authorization cards from alleged discriminatees Peggy Fitzgerald (the wife of Clarence Fitzgerald, Sr.) and Donald Ellis, Bernice Hawthorne's brother-in-law (see *supra* fn. 15). On the following day, June 26, James Hawthorne received a signed authorization card from his brother, alleged discriminatee Elroy Hawthorne (also referred to in the record as "Roy"). On June 28, James Hawthorne obtained signed authoriza-

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17. This unsigned document was offered into evidence by the General Counsel as a statement written by Yvonne Broadwell, and was received in evidence without objection. However, the document refers to "Yvonne . . . and I," and appears to be in the handwriting of Betty Denton rather than Yvonne Broadwell. I refer that it was written by Denton.

tion cards from alleged discriminatees Jo Ann Cranmore and Linda Lee. On the following day, June 29, James Hawthorne obtained a signed authorization card from alleged discriminatee Bobby Bush. That same day, James Hawthorne gave a card to alleged discriminatee Juanita Prince, who signed it under the circumstances described *infra* Part II C. [18] Between June 26 and 30, James Hawthorne also obtained signed authorization cards from about six employees who are not named in the complaint and as of July 29, 1981, were still in Respondent's employ.[19] In addition, he solicited union support from two alleged discriminatees (Baltimore and Carolyn Caldwell) who signed cards at others' solicitation. Also, he gave cards to Cooper (whom the General Counsel alleges to be a supervisor) and Arvin Canada.[20] Hawthorne obtained most of these signed authorization cards while waiting in the plant lounge to drive his wife Bernice, whose shift ended about 10:30 p.m., home from work.

James Hawthorne had been temporarily disabled for work by an on-the-job knee injury suffered about June 9. Initially, his physician treated Hawthorne's injury with injections, and encouraged him to try to see if he could discharge his job duties without knee surgery. In an effort to test his knee, he made a practice of coming into the production area after the machines had shut down toward the end of the second shift, and helping to move boxes around or clean up.

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18. This finding is based on the testimony of James Hawthorne, Prince, and Peggy Fitzgerald. I regard their recollection regarding this matter as superior to that of Willie Caldwell, who testified that his wife obtained Prince's card.
19. Sue Harvey, Leila Moore, Betty Pickle, Percy Ricks, Jerry Summers, and Tim Turner. On August 26, 1982, Summers was still working for Respondent, and testified before me as a witness for the General Counsel. As of late April 1982, Moore was still working for Respondent.
20. There is no evidence that Arvin Canada signed a card himself. As of April 1982, he was still in Respondent's employ.

On July 2, Denton remarked at a production meeting attended by the floorladies, including Weaver, that James Hawthorne was signing people up for the Union (see *infra* fn. 21). On July 8, when he drove up to the plant in his truck, Denton and Broadwell were sitting in a parked car outside the plant. Hawthorne stayed in his parked truck until he at least thought they had left, and then went into the first-floor production area. Thereupon, Broadwell in effect told Weaver to tell him to leave. While Hawthorne was standing in the production area and watching the wrapper run, Weaver came up and told him that he would have to leave because he was no longer on the timeclock. During this visit to the plant, he handed out no union cards. Upon leaving the plant, he encountered Denton and Broadwell. He told them that he had come down to pick up his family. Broadwell said that it was all right for him to wait for his family outside, but that he was not to visit in the plant with the "girls," because they had a job to do. The three had a conversation about a cost-of-living raise, and the wages and benefits paid by another bakery where his son worked. Broadwell's contemporaneous memorandum regarding Hawthorne's July 8 conduct refers only to the subject matter of this discussion. He testified without objection or amplification that he had no problem with management about his being in the plant lounge during his sick leave "until a certain stage, and they realized what I was doing, and they had me leave." Denton testified that Respondent forbids employees to enter the plant if they have not punched in. Hawthorne credibly testified that Respondent made some effort to exclude such employees, but that active employees' relatives and friends nevertheless did enter the lounge and the plant, particularly on the second shift.

During the July 2 production meeting where Denton

said that James Hawthorne was signing people for the Union, she became "real upset." After talking about employees' wanting to join the Union, and Willie and Mae Caldwell's signing them up, Denton said that if they wanted a union, she did not care who signed the cards, but then, if they talked about writeups, they would get writeups when they joined the Union. Then, Denton accused alleged discriminatee Weaver of having signed a card. Weaver asked what she was talking about.[21] Weaver had not yet signed a card, but she signed one at home 2 days later at Willie Caldwell's behest.

Upon the periodic arrival in front of the plant of a vendor's truck from which coffee and snacks were sold, employees were permitted to go to the truck one at a time to purchase refreshments. Alleged discriminatee Dorothy White, who is Mae Caldwell's daughter and Willie Caldwell's stepdaughter, signed an authorization card on June 25 at her mother's house. A notation written by Yvonne Broadwell dated July 1, 1981, states, *inter alia,* that White "Went to Break Wagon, talking Union to Sarah Wilcock /sic/. Stayed 15 minutes." As to the incident which led to this notation, Broadwell testified that when alleged discriminatee Sarah Wilcox returned to the plant, Broadwell asked where White was, and Wilcox replied that White "was out there talk-

21. My findings as to the July 2 production meeting are based on Weaver's testimony. Denton testified that during this meeting she asked Weaver whether she had signed one of the Caldwells' cards, Weaver replied that she had never signed a union card, and Denton then said that she had been joking and that it did not matter either way. Denton's further testimony that Weaver began this discussion by wondering what the Caldwells were doing and speculating that they were getting up a "petition" seems somewhat inconsistent with Denton's further testimony that Weaver then denied signing a "union card." For these and demeanor reasons, I credit Denton's version of this conversation only to the extent that it is corroborated by Weaver. The General Counsel contends that at this time Weaver was a supervisor, and does not allege that Denton's remarks to her were unlawful.

ing union with her." There is no evidence that Wilcox signed a card or in fact engaged in any other union activity.

C. *Alleged Interference, Restraint, and Coercion before the July 1981 Separations*

Employee Carolyn Caldwell, who is the daughter of Willie and Mae Caldwell and resides with them, testified that some time in June, production manager Denton came to her machine and asked her whether she knew anything about the Union, and whether she had signed a union card. Still according to Carolyn Caldwell, Denton asked whether Carolyn's father was participating in the Union, and she replied, "Yes, but that doesn't mean that I signed a union card." For demeanor reasons, I accept Denton's denial.

Employee Dorothy White, who is Mae Caldwell's daughter and Willie Caldwell's stepdaughter, testified that about July 3, while White was working at her machine, production manager Denton approached her and asked whether she had signed a union card. Still according to White, when she said no, Denton said that she had seen White out yesterday in the van when she signed it, and that White was going to be laid off. White did not testify that her half-sister, Carolyn Caldwell, was present during this conversation. Carolyn Caldwell testified that about the same day as the alleged incident described in the preceding paragraph, which incident she dated as some time in June, she went to talk to White during Carolyn's break; that in Carolyn's hearing Denton asked White whether she had signed a union card and White said no; and that both Denton and Carolyn thereupon walked away. In view of the inconsistencies between the testimony of White and Carolyn

Caldwell as to this incident, and for demeanor reasons, I accept Denton's denial.

On June 30, while employees Prince and Peggy Fitzgerald were working next to each other, floorlady Cooper asked Prince whether she had signed a card. "Playing dumb," Prince asked, "What card?" Cooper replied "The union card." Prince said that she had one but had not signed it. Cooper said truthfully that she herself had already signed a card, and said that "we needed [Prince] to sign one." Prince said that she was "scared to" and would have to think it over. Fitzgerald said that she herself had signed a card and that "We need to get more union cards signed," and asked Prince to please sign a card. Cooper promised to give the card to employee James Hawthorne for Prince, who was "scared to" give it to him herself because she was afraid someone would see her. Prince then signed a card, which she had received from James Hawthorne, and gave it to Cooper, who gave it to Hawthorne.[22] The General Counsel alleges, and Respondent denies, that Cooper was a supervisor. This issue is resolved *infra* Part II J 1 a.

About the first week in July, in an employee lounge, then floorlady Weaver asked employee Baltimore whether she knew anything about the Union. Baltimore, who had signed a union card a few days earlier in the plant bathroom, said that she knew nothing about a union. Weaver said that the Union never would get in there, that everybody would be gone by then.[23] The General Counsel alleges, and Respondent

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22. My findings as to this conversation are based on credible parts of the testimony of Prince and Fitzgerald. Cooper did not testify. Cf. *supra* fn. 18.

23. These findings are based on Baltimore's uncontradicted testimony. My finding as to the date is based on her testimony that this incident occurred after she signed her union card, on June 28, and the fact that she was laid off on July 10. She dated the incident as about 2 weeks after she signed her card.

denies, that at this time Weaver was a supervisor. This issue is resolved *infra* Part II J 1 a. The complaint alleges that this incident constituted unlawful interrogation only.

As previously noted, employee Sisk signed a union card on June 30 at the Caldwells' van. Production manager Denton and assistant production manager Yvonne Broadwell saw Sisk's activity from the production office, and Denton noted it in writing on July 1. On Monday, July 6, as Sisk was standing at her work station waiting for her machine to start up, she saw Yvonne Broadwell in the area. Sisk approached her and said, " I heard that y'all got my name down for signing a union card, but I wouldn't sign no union card out at the van." Sisk went on to say that while at the van, she had been looking at a mail-order catalog. Broadwell said, "Well, Wayne Turnbull will be in here today, and they're liable to shut the plant down." Sisk then went on and took her machine.[24]

D. *The Allegedly Discriminatory Reprimand of Employee Zackery; Alleged Additional Interference, Restraint, and Coercion*

Employee Zackery, who is Willie and Mae Caldwell's daughter-in-law, signed a union card at the Caldwells' house on June 2. A week or two later, production manager Denton approached her and said that Denton had seen her sign a union card, to which Zackery replied by laughing.[25]

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24. My findings in this paragraph are based on Sisk's testimony. For demeanor reasons, I do not accept Yvonne Broadwell's testimony that this conversation was occasioned by a statement from Sisk that she might have to leave work early if she did not start feeling better, or Broadwell's denial that she made the remarks about Turnbull.

25. This finding is based on Zackery's testimony. For demeanor reasons, I do not accept Denton's denial.

Zackery was assigned to the second shift (2:30 to 10:30 p.m.). Before entering the plant to begin work on June 29, she saw her father-in-law parked in his van near the plant, waiting to pick up his daughters (Carolyn Caldwell and Dorothy White) when they finished their day shift at 2:30 p.m. Zackery stopped to talk to him. Then, she entered the plant, clocked in on time, and went directly to her machine.[26]

Later that day, production manager Denton told floorlady Weaver that after clocking in, Zackery had gone to the van and talked to Willie and Mae Caldwell for about 10 minutes. At a little after 6 p.m., Weaver approached Zackery at her machine and told her that Denton had said that Zackery was 10 minutes late getting to her machine because she had gone outside and talked to her father-in-law after clocking in. Weaver asked why she had done this. Zackery truthfully replied that she had not done this. Athelene Hubbard, who was then a floorlady, initially said that Zackery had in fact done this, but then said no, Hubbard had made a mistake and it was Bates who had gone out to talk to the Caldwells after clocking in. Bates confirmed that she was the one who had done this. Weaver said, "Well," and that she had just told Zackery what Weaver had been told to tell her.

Thereafter, pursuant to Yvonne Broadwell's instructions, Weaver filled out an "Absentee Report Form." This form is used to record instances where an employee is out sick, is late (with the reason therefor), or leaves early; Respondent also uses an "Employee Warning Notice" form. A printed portion of the "Absentee" form

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26. These findings are based on the testimony of Zackery and of Bernice Hawthorne, who worked with Zackery. For demeanor reasons, I do not accept Yvonne Broadwell's testimony that the Zackery-Caldwell conversation took place after Zackery clocked in.

states, "This report must be filled out and sent to office each day." Weaver testified that this incident occurred on Monday, June 29, but she unexplainedly dated the form Wednesday, July 1. Another printed portion of the form states that the employee "was ABSENT from work today" (emphasis in original). Under "Remarks," Weaver wrote, "Did not take machine at 2:30 p.m. was 10 minutes late after clocking in." After Weaver turned in this form, an unidentified person wrote the words "Warning Notice" on the form,[27] and after this entry was made, the document was initialled by Broadwell. As previously noted, on July 2 production manager Denton remarked that employees who joined the Union would get writeups.

E. *The 1981 Separations; Alleged Further Interference, Restraint, and Coercion*

1. The July 10 separations; alleged further interference, restraint and coercion

a. *Background*

On July 7, 1981, the Union mailed, to all the employees who had signed union cards, a letter announcing a meeting of Respondent's employees on July 12 at the union hall in Chattanooga. Respondent had learned about this meeting by the time it was held (see *infra* Part II E 3), but the record otherwise fails to show when Respondent found out about it. By July 8, Respondent decided to separate a number of employees.

Respondent uses a "Separation Notice" form which,

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27. Broadwell and Weaver both denied making this entry. Denton was not asked about the matter.

under the printed language "Reason for Separation," contains various printed reasons each preceded by a box. The form states, "Check reason and explain if required." The printed reasons include "Lack of Work" and "Discharged." Of the individuals named in the complaint, 19 were separated on July 10. The separation slip issued to each of them is dated July 10, is signed by office employee Mary Vane, contains a check mark before "Lack of Work," and leaves blank the box preceding "Discharged." Turnbull testified, in effect, that Respondent decided to effect the July 10 separations because by that time Respondent knew that it would not be running the fourth-floor machines (which included all the fountain-pack machines) at the new location, because Respondent had accumulated enough fountain-pack stock to satisfy demand until Derby Cone took over that part of the business, and (perhaps) because Respondent had decided to sell the sugar cone roll machines.[28] Turnbull went on to testify that persons were selected for the July 10 separation "on their rating sheets, and the past history of what Betty Denton and Yvonne Broadwell had tried them on, and what job skills they had been able to obtain, and what job skills they hadn't been able to obtain." These rating sheets were not produced, although at the time of the April 1982 hearing they were still in existence. Turnbull further testified that in March, April, and May 1981 Respondent transferred to the fourth floor "Basically, people that were not willing to learn the new skills, or not able to learn the new skills, or had high rates of absenteeism . . . they were moved, whenever feasible, when we needed the fourth floor. Sometimes for a period of time, sometimes for a week at a time." Turnbull went

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28. In connection with the sugar cone roll machine, his testimony consisted of an implied response to a question (to this extent leading, but not objected to) by Respondent's counsel.

on to testify that the employees who were selected for separation on July 10 "couldn't physically work on the fourth floor, because there was only a couple of machines running up there at the time. Both shifts. But these were people that had been primarily designated fourth floor type employees, because they had tried these other job skills and didn't grade out well on them." A September 3, 1981, letter to a Board investigator from Respondent's labor relations adviser, and subscribed to in Turnbull's prehearing affidavit, gives no explanation for selecting, for inclusion in the separations, any employees who were not working on the fourth floor, and implies that all of the employees separated on July 10 were working there.

b. *The separation of Ellen Finley. Linda Sisk, Dorothy White, and Virginia Wills; alleged further interference, restraint and coercion*

(1) Finley's work history and union activity

Ellen Finley started to work for Respondent in 1973. Until about the end of 1974, she worked as a cone packer on cake cone machines.[29] Then, she was assigned to the sugar roll cone machines.

29. This finding is based on her testimony, partly corroborated by Yvonne Broadwell. Turnbull had not been regularly present at the plant until 1981. I do not accept his testimony that Finley had always worked on the sugar roll cone machines. I give no weight to Yvonne Broadwell's testimony that Finley was transferred to the sugar roll cone machines because she was unable to keep up with a single cake cone machine. There is no other evidence that it was easier to pack from the sugar roll cone machines than from cake cone machines. Broadwell was not a supervisor at the time of Finley's 1974 transfer to sugar roll cone machines, there is no evidence that Finley performed unsatisfactory work on the fountain pack cake cone machines on which she was working when separated, and Broadwell testified that she encouraged Finley to learn how to pack from double cake cone machines.

About April 10, 1981, Denton and Broadwell reported to Turnbull that Finley was refusing to try to pack from the double machines or operate the new-type machines, and asked him to induce her to try such machines. Thereafter, he told Finley that she could make more money if she learned to operate the new taping machines or pack from the double machines. She said that she wanted to stay where she was. He said that the jobs were changing at the plant, that some day Respondent might stop making sugar cones, and that he would encourage her to try new things. She said that she was happy where she was, and if he was happy with her staying where she was, she was satisfied with that. He said that this was all right with him. On an undisclosed later date, Denton again asked Finley to try to "qualify" on double machines, and offered to help her learn. She said that she did not want to do it because it made her too nervous.

On June 2, 1981, Respondent posted on the employee bulletin board a notice, removed on June 18, that as of June 5 Respondent would be running only one shift on the sugar roll cone machines. The notice went on to say that it was cheaper for Respondent to buy such cones than to make them itself. The notice stated that the existing sugar cone roll machines would be phased out of operation by October 1, and that Respondent would purchase all of such cones from outside sources until Respondent moved to the new plant and had time to investigate other machines. The notice stated, "Everyone involved in the Sugar Department will be given opportunities to learn new things and be placed in other departments." Further, the notice encouraged employees in that department to learn the new

assignments.[30] After this notice was posted, Finley continued working on the sugar roll cone machines.

Finley picked up a union card from Willie Caldwell at his van on June 26, and returned it with her signature to him on June 27. Thereafter, Finley was required to work on double machines 8 and 9 (see *infra* fn. 31), which were so arranged that the cones deposited on the common conveyor belt were facing in opposite directions. Finley worked on these two machines for 2 days, but was unable to keep up with them (cf. *infra* fn. 54). She was then sent to the fourth floor to pack fountain pack cones. She remained there until her July 10 separation.[31]

(2) Sisk's work history and union activity

Linda Sisk's seniority dated from June 1977; she had also worked for Respondent between June 1969 and September 1971. Among the employees who worked on double machines were Sisk, Josie Anderson, and Leila Moore. Of these employees, two would each pack from a double machine, and the third would straighten up the "messed up" cones. Turnbull testified that the machines on which these three employees worked had been very roughly tied together; and that although none

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30. My findings that this notice was posted in based on Turnbull's testimony and on the notice itself. Finley testified that "Nobody didn't tell me" that these cones were going to be phased out completely because buying them was cheaper than making them. However, she testified that by the end of May, she knew that these cones were not going to be made at the new plant.

31. Finley testified that she was assigned to the double machines after signing a union card and that she was sent up to the fourth floor after 2 days on the double machines. However, she further testified that at the time of her separation, she had worked on the fourth floor for about 4 weeks; and she signed her union card on June 26, about 2 weeks before her July 10 separation. Nobody else testified about the date on which she was assigned to the double machines or the date on which she was transferred to the fourth floor. I regard her memory about the sequence of events as more reliable than her memory about their date and duration.

of them was ever able to pack a double machine all by herself, all of them "showed exemplary attitudes towards. . . fighting a new system, and really tried to make it work." In late April or early May, after watching them work for several days, Turnbull called them to the office and gave each of them a potted flower. Office employee Vane told them that Turnbull wanted them to have the flowers because they had been doing such a good job.[32]

The double machines on which Sisk worked were on the third floor, which for seniority reasons was supposed to be her permanent floor. However, this floor had no restroom. On an undisclosed date after she received her potted flower, she asked to be relieved from that floor for a day or two, because of an illness which required frequent use of the restroom. She was thereupon assigned to machine 17 on the second floor. Her condition cleared up in early May, and she asked to be put back on her third-floor double machines. Denton told her that machines 17 and 18 (another second-floor machine, then inoperable) were now her permanent machines. Also, at some time between the late March installation of the taper and her July 10 separation, she ran the taper. She asked when she was to get a raise, and was told that she had to learn "everything."

My findings in the foregoing paragraph are based on Sisk's testimony. In view of the credible testimony

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32. My findings about the potted-flower incident are based on credible parts of Sisk's and Turnbull's testimony. My findings as to the date are based on Sisk's testimony. Turnbull's testimony that these three employees were "some of the early people that were given the opportunity" to try to work on double machines, and that the flowers were initially intended to start a program of giving flowers to people who tried, is difficult to reconcile with his further testimony that by the time he gave out the flowers, 9 or 10 others had tried to work on double machines. The foregoing testimony aside, he attached no date to the flower-giving.

(much of it by Turnbull) regarding the flower incident, I do not accept Denton's testimony that "time and time again" Sisk refused to try to work on a double machine; that she eventually did try on about three occasions, but asked to be taken off because of illness; and that she eventually said that she did not want it, it made her sick. Sisk visited her doctor on four occasions between February 2 and April 30, 1981, and made no subsequent visits at any material time. She complained of illness to floorlady Weaver on June 8, but worked 8½ hours that day.

As previously noted, production manager Denton and assistant production manager Yvonne Broadwell saw Sisk sign a union card at the Caldwells' van on June 30; and on July 1 and 2, Denton made a written note of this activity and of a report that Sisk tried to induce another employee to sign a card. As previously noted, on July 6, 4 days before Sisk's separation, Broadwell told her that because of the union activity, the plant was "liable" to be shut down (see *supra* Part II C).

(3) White's work history and union activity

Dorothy White's seniority date was June 1977. On a date not shown by the record, but obviously after Denton became a supervisor about February 1981, Denton took White to the second-floor lounge, told her that she had a very bad temper, and tried to encourage her to be a better employee and to be more cooperative. White said that she could not help having a bad temper, because she was "born under that sign." Also, on two dates not shown by the record but after Denton became a supervisor, White was written up for having a bad "attitude" in that she talked "mean" to everybody and did not come into work with a smile on her face. About early June 1981, she forgot to bring a hair net, which she

was required to wear on the job, and Denton sold her one for 10 cents (as was Denton's practice when an employee forgot a hair net). Also, White received a written warning notice dated June 25, 1981. Checks were inserted before "Conduct" and "Attitude." Under "Remarks" was the entry, "Insubordinate would not do what she was told without arguing all around bad [attitude].[33] 6/26/81 not in proper dress code." The "dress-code" violation consisted of wearing yellow instead of dark or white pants.[34]

My findings in the preceding paragraph are based on credible parts of White's and Denton's testimony. Except to the extent already found, I do not accept testimony that White violated the dress code on three or four occasions when she said she had nothing else to wear. Also, in the absence of documentary evidence from Respondent's records, I do not accept Denton's testimony that White was late for work almost every morning, or Broadwell's testimony that White was constantly late for work or in returning from her breaks, and accept White's denials.

About June 21, White was assigned to work at a double machine on the third floor. She worked on that machine for 3 days, and Denton told her that she was "proud" because White "was doing good." Denton further said that White was going to get a raise.[35]

As previously noted, White is Mae Caldwell's daughter and Willie Caldwell's stepdaughter. White

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33. At this point, the initials, "N.C." are scratched out. The slip is signed by Nellie Chandler, inferentially a floorlady at that time.
34. Denton had given her advance oral permission to wear these yellow pants.
35. My findings in this paragraph are based on White's testimony. I reject as to some extent internally inconsistent Denton's testimony that Denton asked her to qualify on double machines, White said "No way. . . I don't want to work that hard," but White did try to work two machines.

signed a union card on June 25. As previously noted, Yvonne Broadwell made a notation that on July 1, White had spent 15 minutes at the break wagon "talking union" with employee Wilcox. Upon White's return, Broadwell told her that she had "overstayed," that Broadwell would have to relieve other employees who also wanted to patronize the coffee wagon, and that, accordingly, White should have returned from the wagon immediately,[36] White never did get the raise which Denton had promised her. About the end of June, she was transferred to the fourth floor.

(4) Wills' work history and union activity

Virginia Wills' seniority date was May 1972. Upon seeing the March 30, 1981, notice about working on double machines, Wills asked general production manager Hood, "Suppose I can't work them double machines?" He said that she would have to stay at her present pay rate. She said that this was what she wanted to do. He said that she did not have to work them if she did not want to. Later, when she was asked to "qualify" on the double machines, she said that she did not want to work that hard.[37] On one occasion, she did work a double sugar-cone machine by herself for about an hour, to show Dention that Wills could do it; but thereafter she was moved at her own request, and she refused to try a double machine again.

On June 24, 1981, Wills received an authorization card from Willie Caldwell at his van. She took it home, and returned it to him with her signature at his van on the following morning.

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36. This finding is based on Broadwell's testimony. For demeanor reasons, I do not accept White's denials.

37. After Wills' earnings reached a certain level, her Social Security income dropped.

(5) The issuance of separation slips to Finley, Sisk, White, and Wills; alleged independent interference, restraint, and coercion

As of July 10, the first-shift employees working on the fourth floor were Finley, Sisk, White, and Wills. About 12:30 p.m., after the employees had returned from their lunch break, general production manager Hood shut down all the machines on that floor and told the fourth-floor employees to proceed to the second-floor employee lounge. When they reached the lounge, they were addressed by Yvonne Broadwell, in Hood's and Denton's presence. Broadwell said that the fourth floor was cut off because the machines on that floor would be the first to be moved to the new plant, orders had slacked off, and there would have to be a layoff.[38] She said that Respondent would call the employees back when Respondent needed them.[39] Broadwell asked the employees to clean out their lockers and leave at once, in order to avoid disturbing the other employees, and not to come back to the building. Also, Broadwell gave the employees their separation notices, their paychecks (which included pay for the rest of that day), and their vacation pay.[40]

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38. My findings in this sentence are based on credible parts of Broadwell's memorandum of these events, and credible parts of the testimony of Sisk, White, Finley, Wills, Broadwell, and Denton.

39. This finding is based on credible parts of Broadwell's memorandum of these events. For demeanor reasons, I do not accept the somewhat different version of White ("I don't know when you all will be called back"), Finley ("But they would call us back"), or Wills ("... when we got all set... she'd call us back").

40. My findings in this paragraph are based on a composite of credible parts of the testimony of Finley, Sisk, White, Wills, Broadwell and Denton. White is the only witness who testified that Denton said anything during this part of the incident. I do not accept White's wholly uncorroborated testimony that Denton said there might be another layoff in a week or two. Rather, I credit Sisk's testimony that during this part of the incident, Denton said nothing.

At this point, employee Wills said that Respondent had put these four employees on the fourth floor because Respondent intended to get rid of them.[41] Sisk started to cry, and left the room with White. Then, Finley, Denton, and Wills, in that order, headed toward the door. Ellen Finley stopped at the door, turned to face Denton, and asked, "Why are you laying me off? . . . I have more seniority than some here, and there are some here that can't run any machines. I can run some of them. And you're keeping some that can't run any machines."[42] Denton said, "Well, we're laying you off, Ellen, because I know you signed a union card."

Except as otherwise indicated, my findings in the preceding paragraph are based on the testimony of Finley and Wills. Finley testified that general production manager Hood was in a position where be could overhear this conversation. Hood, who at the time of the hearing was still in Respondent's employ in a supervisory capacity, did not testify, nor was his absence explained. Both Broadwell and Denton denied that this conversation occurred, and testified that they and Hood remained together in the room until all the employees had left. In view of Hood's failure to testify, other inconsistencies between Broadwell's and Denton's testimony (*supra* fn. 41), and demeanor considerations, I discredit such testimony, and credit Finley and Wills notwithstanding the omission of this statement from Wills' prehearing affidavit.

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41. My findings that Wills said this is based on credible parts of the testimony of Finley and Wills, partly corroborated by Denton. For demeanor reasons, I do not accept Broadwell's testimony that Wills said nothing. As previously noted, Respondent takes the position that these four employees had in fact been assigned to the fourth floor for that reason.

42. Finley had in mind employee Marcella Cobb, Betty Denton's sister, who was 5 years junior to Finley. Cobb cried throughout the 2-day period she tried to work on double machines and was thereupon sent back to packing from the sugar roll cone machines, where she was working when Finley was separated. Cobb's retention is discussed *supra* Part II A 10.

c. *The separation of Rita Cunningham*

Rita Cunningham began to work for Respondent in 1974. She was a cone packer throughout her employment. She worked on combined machines for a couple of days, but then began being transferred to various machines to fill in for absent employees.[43] Denton told her that she would have to learn all the machines on every floor before she could get a raise, and that she was being asked to train on the other machines because those skills that she was going to learn would be needed at the new plant.

Cunningham signed a union card at her house on June 25, 1981, at Willie Caldwell's request (see *supra* fn. 15). She telephoned production manager Denton on July 10, inferentially before or shortly after the beginning of Cunningham's shift at 6 a.m., to state that Cunningham was too sick to work. She asked if she could come and get her check later on that day, which was the regular payday. Denton told her to come in about 2:30, the end of the first shift. When Cunningham arrived, Denton met her at the door and told her that she had been laid off with 17 other "girls."[44] Cunningham asked when she would be called back. Denton replied that Cunningham would be called back whenever they moved to the new plant, but that Denton did not know when it would be. On an undisclosed date, Cunningham had asked Denton whether there was going to be a layoff, to which Denton replied that she really did not know.

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43. This finding is based on Cunningham's testimony. I do not accept Denton's testimony that Cunningham refused to try to qualify on the double machines because she had wrist trouble. Denton's testimony that Cunningham usually worked 2 or 3 months in the summer is inconsistent with the parties' prior stipulation that between 1967 and 1981, she worked from January until laid off on August 30 or later, except that in 1977 she worked from early March to her layoff in late September.

44. The 19 alleged July 10 discriminations included two males — Johnny Baker, Jr., and Ricky Huggins.

d. *The separation of Peggy Fitzgerald*

Peggy Fitzgerald worked as a cone packer for Respondent between 1966 and 1969, and from 1976 (her seniority date) until her 1981 separation. Upon qualifying on the double machines, she was classified on April 8, 1981, as a Class 1 operator, and her wages were increased to the level called for by that classification. She continued to receive this wage rate until her July 10 separation.

Employee Clarence Fitzgerald, Sr., who initiated the contact with the Union and who is Peggy Fitzgerald's husband, was discharged about May 1, 1981.

At the time when Peggy Fitzgerald was reclassified to Class 1 in April 1981, she was packing by herself from machine number 4, on the fourth floor, a machine whose production was normally packed by two cone packers. Shortly thereafter, she was transferred to the third floor, where was initially assigned machines 8 and 9 and also operated the sealer. About June 16, while she was operating the sealer, she asked then floorlady Hubbard, who was relieving on another machine, to hand Fitzgerald some torn cartons which she could not reach. Hubbard told her to get them herself if she wanted them. A couple of days later, when packing from combined machines 8 and 9, Fitzgerald noticed that they were not working properly: one was not baking, and the other was producing defective cones. She asked Hubbard on three occasions to call someone to repair Fitzgerald's machines, but Hubbard ignored her. Then, Fitzgerald left her machines and called for someone to repair them. Floorlady Weaver told her that she was not supposed to leave her machines at any time except when she was being relieved to go on break. Fitzgerald's break was past due. She asked Weaver to please get someone to work on Fitzgerald's machines. They continued to work

badly for the rest of the shift. At some time during the course of that evening, after machines 8 and 9 had begun to work improperly, production manager Denton chastised Fitzgerald for falling behind on her machines and throwing away the good cones. On the following evening, June 19, machines 8 and 9 were shut down completely, and Fitzgerald was assigned to run combined machines 10 and 11. One of them did not work properly.

Inferentially about June 18, Hubbard and Weaver complained to Denton that Fitzgerald "would never say anything, her attitude was negative." Also, on about three occasions after her husband's discharge about May 1, Peggy Fitzgerald failed to respond to greetings by Denton, who had to some extent been involved in his discharge. On June 19, Denton, Weaver, and Hubbard met with Peggy Fitzgerald. Denton told Fitzgerald that she could be a part of "our team" and be one of the "top girls," except that she had a poor attitude in that she did not talk enough to other people in the plant. Fitzgerald said that it was Hubbard who was refusing to talk to Fitzgerald, and not the other way around. Denton said that Fitzgerald seemed to resent Denton's talking to Fitzgerald, and asked whether she thought Denton had something against her, or she had something against Denton. Peggy Fitzgerald said that Denton was the reason Clarence Fitzgerald, Sr., had been let go. Denton said that his discharge had been his own fault. Denton again explained the grading procedures, and said that Peggy Fitzgerald graded very poorly as to attitude. Fitzgerald replied, ". . . it's the way you look at it."[45]

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45. My findings in this paragraph are based on a composite of credible parts of Fitzgerald's and Denton's testimony. See *infra.*

The following Monday, June 22, Peggy Fitzgerald was assigned to pack from combined machines 14 and 15 on the second floor with employee Prince; this particular combination had always been worked by two employees. Fitzgerald continued to work there until her July 10 separation. The June 19 interview was the only occasion on which she was ever counseled about her attitude, and there is no evidence that she was counseled about anything on any other occasion.

Fitzgerald signed a union card on June 25, before cards were signed by Hubbard and Weaver. On July 10, Fitzgerald arrived at the plant before the beginning of her shift (the second shift) and went into the lounge. One of the other employees entered the lounge and told Fitzgerald that Denton and Weaver wanted to see her. Fitzgerald thereupon left the lounge, and saw Denton and Weaver standing next to the timeclock. Weaver gave Fitzgerald her check (including pay for a full day's work on July 10), her vacation pay, and her separation slip; and said that "they were sorry, that they didn't need [her] any more." Fitzgerald then went back to the lounge to tell her sister-in-law, second-shift employee Prince, that Fitzgerald would be back later that night (the shift ended at 10:30 p.m.) to pick her up. Weaver came to the lounge and told Fitzgerald "to get out, [Fitzgerald] was no longer employed there, [she] didn't have any business in the building."

As previously noted, my findings as to the June 19 interview are based on a composite of credible parts of Fitzgerald's and Denton's testimony. I do not accept Denton's testimony, denied by Fitzgerald, that on this occasion she was also reproved for working too slowly, Denton did not testify that Hubbard or Weaver made such a complaint to Denton; it is uncontradicted that Fitzgerald had been working alone on combined

machines since her April Class 1 classification (one of the few employees able to do so for any sustained period); at all times thereafter until her July 10 separation she received Class 1 wages, whereas employee Mae Caldwell's wages had been cut because she could not (or, perhaps, had refused to) pack from double machines; there is no evidence that Fitzgerald was reproved, on any occasion other than June 19, for working too slowly; and her rating sheets were not produced. For similar reasons, I do not regard as sincere Denton's testimony that Peggy Fitzgerald failed to "keep up" after her husband's discharges in early May.[46]

e. *The separation of Betty Baltimore*

Betty Baltimore's seniority date was April 1975. In addition, she had worked for Respondent on various occasions between 1967 and 1974. Each such tour of duty was terminated by a quit. During an undisclosed period before May 11, 1981, she served as floorlady on the second floor, which had one pair of ganged machines. On that date, at her own request, she was transferred back to cone packing, a transfer which caused her wages to be cut by 15 cents an hour. A floorlady's duties included relieving employees during their breaks. Baltimore credibly testified that she was capable of working on double machines. Also, employee Bernice Hawthorne credibly testified that she and Baltimore were the first employees to learn how to operate the combined wrapper. However, at the time of Baltimore's July 10, 1981, termination, Respondent had never told her that she

46. However, in so finding, I attach little significance to Peggy Fitzgerald's honest testimony that she never decided not to work hard any more and not to keep up with production, and always worked as hard as she could. Such testimony is not inconsistent with the contention that her production did in fact slow down, or with a sincere belief by management that such a slowdown occurred after her husband's discharge.

was qualified to be a Class 1 operator, and she was received only Class 2 pay.

About June 10, Baltimore found in the plant a yellow slip of paper with the names of 12 employees (not including hers) and the entries "July" and "August."[47] She asked Denton what the slip was, and whether Baltimore was going to be laid off. Denton did not explain what the slip was, but said that Baltimore was not going to be laid off. About June 25, at James and Elroy Hawthorne's instance, Baltimore signed a union card in the bathroom and returned it to Elroy. As previously noted, a few days later, floorlady Weaver asked her whether she knew anything about the Union; and when Baltimore untruthfully said no, said that the Union would never get in there, that everybody would be gone by then.

As of July 10, 1981, Baltimore was working as a second-shift cone packer on the fourth floor. When she came to the plant that day, floorlady Weaver met her at the door, gave her her check, and said that she was laid off.

f. *The separation of Mary Zackery*

Mary Zackery worked for Respondent as a cone packer from September 1980 to her July 10, 1981, separation. She had also worked for Respondent as a cone packer between June 1976 and April 1, 1977, when she quit. On a date not shown by the record, she was given an opportunity to qualify on the combined machines, but

47. Denton and Broadwell at least ordinarily used yellow paper to prepare the notes which they used for their own purposes when performing supervisory functions.

refused to do so.[48]

Zackery's union activity and connections are set forth *supra* part II D. She worked on the second shift, mainly on the third floor but sometimes on the fourth floor. She was out sick for a day or two, because of hemorrhoid problems, about June 1981; and was also out sick between July 7 and 9 because of what was then diagnosed as a "virus" (but was actually pregnancy). On July 10, the day she returned to the plant to work, floorlady Weaver met her at the door, gave her her paycheck and separation slip, and said that Zackery had been laid off. Weaver said that a lot of people had been laid off, and that only five machines were running. The previous month, Weaver had told her that she would not be laid off in connection with the move to the new plant, but would be going to the new plant.

g. *The separation of Carolyn Caldwell*

Carolyn Caldwell started to work for Respondent on February 2, 1981, as a cone packer. After qualifying on the double machines, on May 29, 1981, she received a wage increase to the level of Class 1 operator. Assistant production manager Yvonne Broadwell testified that Carolyn Caldwell "was great on work, and she was fast with her hands. She really was. . .she was great on those machines. . .she was a good worker, she really was." During the 1-week pay period ending Wednesday, June 3, 1981, she worked four double shifts and one single shift, a total of 71½ hours. She also worked a dou-

48. This finding is based on Denton's testimony. I reject as internally inconsistent Zackery's testimony that she ran combined machines 8 and 9 by herself "lots of times" but management never put her on the combined machines, although management did talk to her about such an assignment (without explaining the reason therefor) and she said that she "was willing to try."

ble shift during the following week, and a double shift on May 4, 1981. About June 9, 1981, at her request, Respondent transferred her from the second to the first shift, in order to enable her to go to summer school at night. While attending school, she was unable to work overtime.

Caldwell was not absent from work for sickness or any other reason until June 12, 1981. Respondent's records show that between that date and June 30, 1981, she came to work every day, but left work early on four occasions because of illness.[49] In late June, she was counselled about her attendance. Respondent's records show that Caldwell worked a full day on June 26. However, on an undisclosed date, she signed an absentee report stating that she was absent on June 26, and with the entry (in an inidentified hand bearing no resemblance to hers) "to [sic] and not keeping up like she should."[50]

Carolyn Caldwell is the daughter of Willie and Mae Caldwell. She signed a union card at her home about May 20, 1981. She was out sick beginning July 6.[51] Her July 10 separation slip and her paycheck were brought to her by her half-sister, employee White.

h. *The separation of Bernice Hawthorne*

Bernice Hawthorne worked for Respondent from 1968 until her July 10, 1981, separation. She began work-

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49. Her illness turned out to be of a temporary nature. However, she did not then know this, and, of course, neither did Respondent.

50. In view of her signature on this report, I do not accept her testimony that she was "keeping up my machine real good" when she was on the job.

51. My findings as to her attendance are based on Respondent's records. I do not accept assistant production manager Broadwell's testimony that Caldwell was out sick for 2 or 3 weeks at a time.

ing as a "wrapper girl" on a single wrapping machine. After Turnbull took charge of the plant, two wrapping machines were combined. Bernice Hawthorne was one of the first two employees to qualify on the combined wrapping machines. Thereafter, assistant production manager Yvonne Broadwell told Bernice Hawthorne that she had nothing to worry about, that she was going to the new plant, and that Turnbull was really pleased with the way she ran the wrapper.[52] On April 8, 1981, her wages increased to the rate of a Class 1 operator. Her payroll change notice (signed by then floorlady Baltimore and general production manager Hood) bears the handwritten notation, "Doing her work & great job of it."

After Bernice Hawthorne received her raise, she was assigned to a number of different jobs. She ran combined machines 10 and 11, 12 and 13,[53] and 8 and 9;[54] ran single machines 18 and 19; ran the boxer; and acted as fourth-floor floorlady. On a date not shown by the record, floorlady Weaver came by Hawthorne while she was working combined machines 8 and 9, and asked her why her face was red. Hawthorne replied that she thought her blood pressure was up a little bit. An hour or two later, Weaver took her off the double machines. After Hawthorne received her raise, she worked at every job to which she was assigned, and was never criticized for her work on any of them. She credibly testified to the belief that she worked as hard as she knew how.

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52. This finding is based on Bernice Hawthorne's testimony. For demeanor reasons, I do not accept Broadwell's testimony that upon being transferred from the wrapping machine, Hawthorne asked whether she was going to be laid off, and Broadwell said, "Not so far as I know."

53. Combined machines 12 and 13 were always run by two employees at once.

54. Combined machines 8 and 9 deposited cones so that they were lying in opposite directions on the same conveyor belt. While Hawthorne was running these two machines, she shared an assistant ("shotgun girl") with other packers who were running other sets of combined machines.

My findings in the foregoing paragraph are based on Hawthorne's testimony. I do not accept Denton's testimony that shortly after receiving her raise, Hawthorne started "falling back," would not do everything she was supposed to do, repeatedly asked to be changed to other jobs on the ground that she was nervous and it made her blood pressure go up, and "just started falling down in her attitude, and not caring." Hawthorne's rating sheets were not produced, and there is no evidence that she ever received any written reprimands or was ever counseled about her work. Moreover, she continued to receive Class 1 pay throughout her employment, although Respondent had previously cut employee Mae Caldwell's pay because she could not (or, perhaps, had refused to) pack from double machines. For demeanor reasons, neither do I accept Turnbull's testimony that Hawthorne complained about having too much to do on the combined wrapper. Rather, I credit Hawthorne's testimony that this was her preferred job.

Bernice Hawthorne is James Hawthorne's wife and Elroy Hawthorne's sister-in-law. She signed a card on June 25, 1981, at her husband's instance. On an undisclosed date, she obtained permission to take time off on Thursday and Friday, July 9 and 10, to make preparations for her daughter's July 11 wedding. On July 11, second-shift employee Donald Ellis, her brother-in-law, brought her her separation notice. After receiving this document, Bernice Hawthorne telephoned floorlady Weaver and asked why she had not told Hawthorne on Wednesday night, when they had conversed, that she had been laid off. Weaver replied that she did not know it because Hawthorne's card was still in the rack. Bernice Hawthorne's last assignment before her July 9-10 leave of absence, during which she was

laid off, was to act as fourth-floor floorlady.[55]

i. *The separation of Linda Lee*

Linda Lee's seniority date was February 1981, but she has also worked for Respondent on various dates between 1968 and 1980. On June 19, 1981, her hourly wage rate was increased by 15 cents an hour, to $4.10;[56] the relevant payroll change notice states that her conduct was excellent and her ability, attendance, and production were good. After qualifying on double machines, she received a wage increase on July 7, 1981, to the rate of Class 1 operator. At the time of her separation, she was a second-shift employee on the sugar cone (second) floor.

On an undisclosed date in June 1981, Lee told assistant production manager Broadwell that Lee had been approached to take a card, but had not taken one. Lee signed a card on June 28 at James Hawthorne's instance.

Denton testified that Respondent had not initially intended to include Lee in the layoff. Denton went on to testify that when Lee was "out there when we were laying them off," she asked to be laid off because she needed to spend some time with her little boy. Still according to Denton, she agreed, and had office employee Vane prepare Lee's separation slip. Turnbull testified that on a date and at an hour which he was not asked to give

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55. This finding is based on her testimony. Because Hawthorne would be more likely than Broadwell to recall Hawthorne's own work assignments, I do not accept Broadwell's testimony that Hawthorne's final job assignment was working on a single machine on the second floor.

56. The record suggests that this increase may have been due to her appointment as floorlady (see page 219, lines 10-19, of the transcript). There is no evidence that she was a floorlady when she was separated.

(although he testified that on July 10 he was probably in New Orleans), he asked Denton why Lee had been laid off on July 10 although she was a "better worker and a good worker"; to which Denton replied that Lee had asked to be laid off to spend some time with her son "and if she doesn't want to be around and she doesn't want to work, then I think we should lay her off." Lee did not testify.

Denton has a practice of preparing handwritten notes of events which occur at the plant. Two of her handwritten notes (General Counsel's Exhibits 96 and 97), both dated July 10 and listing employees who were terminated that day, include Lee's name, which appears in neatly and evenly spaced lists of such employees and is not among various other names which appear to have been added after the original lists were written.[57] Nor does Lee's name appear, as an employer to be retained, on a Denton note of such employees dated July 8.

j. *The separation of Earline Bates: further alleged interference.*

Earline Bates had worked for Respondent as a cone packer since 1974, her seniority date. Between her recall from layoff in early February 1981 and her July 10, 1981, separation, she was out sick for 3 days and left work early on 4 days (for the respective reasons of "per-

57. These documents contain unexplained pecularities. Thus, General Counsel's Exhibit 97, whose physical appearance indicates that it was prepared after General Counsel's 96, does not contain the names of several employees (Cranmore, Huggins, and Capes) who are listed on General Counsel's Exhibit 96 and were in fact separated on June 10; lists a "JoAnn Starnes" (of whose existence there is no other record evidence); and states "total of 17 people" (but lists 17 only if Linda Sisk, who is listed twice, is counted twice). Moreover, the verbs used in General Counsel's Exhibit 97 indicate at certain points that the document was written before the terminations, and at certain points that it was written afterward. See also, *infra* Part II J 3 a (2).

sonal problems," her baby was sick, she went to a funeral, and her sister had an operation). On 2 days during this same period, she worked 16 consecutive hours.

Bates was one of the first employees who learned how to run double machines, and on occasion she did so for two consecutive shifts, but she never received a wage increase to the rate of a Class 1 operator. She complained about the matter to floorlady Weaver, who said that she had talked to Denton about the matter and did not know why Bates had not received the raise; "It's not right." She asked Denton about the raise on July 9, and Denton replied that "they" had just talked the matter over and it would be on Bates' next paycheck, but she was separated the following day.[58]

Bates signed a union card on June 29, 1981, at the Caldwells' van outside the front door of the plant. At that time, supervisors Denton and Broadwell were sitting in a car parked at the front door of the plant.

Assistant production manager Yvonne Broadwell testified that Respondent permits employees to carry out a box of cones when they want them. From time to time, this had been done by other employees (sometimes on a daily basis) and Bates herself. In each such instance, Bates had requested and obtained permission from the wrapper employee, who Bates knew was not a supervisor. On July 9, Bates approached employee Cranmore, who was working at the wrapper, and asked for some cones. Cranmore told her to take all she

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58. My findings in this paragraph are based on Bates' testimony, corroborated by Zackery as to Bates' work on double machines. For demeanor reasons, I do not credit Denton's denial. For demeanor reasons, and because Bates' rating sheets were not produced, I do not credit Denton's further testimony that Bates had a "poor attitude" and "didn't seem to act like she cared or was interested."

wanted. Bates took about seven boxes, each containing about 12 cones. Then, Bates gave the boxes to her brother, who was not an employee but had gone into the plant. At this time, supervisors Broadwell and Denton were sitting in a car parked on the street outside the plant door.[59] When Bates' brother left the plant with the seven boxes, the two supervisors jumped out of the car and asked him where he got them. He said that Earline Bates had given them to him. Then, the supervisors asked her where she had got them. She said that Cranmore had given permission. Denton said that Cranmore had no right to give permission. Cranmore said that she had told Bates she could have one box. The supervisors told Bates to take the boxes back. She did so, and then returned to work.[60]

On July 10, when Bates was on the third floor, Denton and Broadwell brought her an envelope containing her check and her separation slip. While Bates was opening the envelope, Denton left the area. Bates asked Broadwell why Bates had been laid off. Broadwell told her to call Denton. Bates called Denton on the plant paging system, whereupon Denton returned to the area. Bates asked why she had been laid off when Linda Farris had been retained. Denton said that Farris had

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59. As discussed *infra*, on occasion neither Denton nor Broadwell was present in the plant during the second shift. Broadwell testified that they had driven to the plant after a common social engagement, to find out how things were going at the plant in view of a new girl on the floors; and they remained in the car because the plant was located in a rather dangerous part of town and they saw several people in the plant who did not belong there.

60 My findings as to this incident are based on a composite of credible parts of the testimony of Bates, Broadwell, and Denton. I do not accept Bates' testimony that she gave her brother two boxes of cones at the doorway in view of Broadwell and Denton. Bates in effect admitted that the incident occurred before the end of her shift, and she testified that her brother was waiting to pick her up from work. If only two boxes had been involved, it would have been more natural for her to remain at her work station until the end of the shift, and to bring the boxes out with her whom she left the plant to join her brother.

received a Class 1 classification. Bates, who had qualified on double machines before Farris had, said that the reason Bates had not received a raise to Class 1 was that Denton had not given her one. Then, Broadwell asked whether Bates had signed a union card. Bates untruthfully said no. Denton said that Bates would be called back. About 2 weeks earlier, Denton had told her that she had nothing to worry about, that she was in the "A group."[61]

On July 13, 1981, the Chattanooga Housing Authority, in order to ascertain Bates' continued eligibility to continue residing in a low-income housing development, sent Respondent a questionnaire regarding her employment status. On an undisclosed date, Respondent returned the questionnaire, with an "X" in the box before the printed entry "Employee Terminated"; a statement that the termination was for lack of work; a blank before the printed entry "Employee on Leave"; and a notation after the printed entry "Date expected return," "do not know at this time."

k. *The separation of Wilma Benton, Wanda Brown, Jo Ann Cranmore, and Sarah Wilcox*

Wanda Brown's seniority date was April 1976. Wilma Benton's seniority date was June 1976. Jo Ann Cranmore's seniority date was March 12, 1981, but she had

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61. My findings in this paragraph are based on Bates' testimony. For demeanor reasons, and in the absence of corroboration by Denton, I do not accept Broadwell's testimony that she never asked Bates whether she had signed a union card. For demeanor reasons, and in the absence of corroboration by Broadwell, I do not accept Denton's testimony that she did not tell Bates that she would be called back. For demeanor reasons, I do not accept Denton's testimony that she did not tell Bates, about 2 weeks before she was laid off, that she had nothing to worry about.

previously worked for Respondent during various periods between June 1974 and August 1980. Sarah Wilcox's seniority date was February 27, 1975, but she had previously worked for Respondent during various periods between 1960 and March 1974. All of them were Class 3 packers.

Brown and Benton signed union cards on July 1, 1981, and June 27, 1981, respectively. As previously noted, Cranmore signed a union card on June 28 at James Hawthorne's instance. As previously noted, Yvonne Broadwell prepared a written memorandum dated July 1, 1981, that alleged discriminatee White had been "talking union" with Wilcox. There is no evidence that Wilcox ever signed a card or in fact engaged in any other union activity. Benton, Brown, Cranmore, and Wilcox were separated on July 10.

1. *The separation of Johnny Baker, Jr., Willie Lee Capes, and Ricky Lynn Huggins*

Johnny Baker, Jr., a shipping employee, began to work for Respondent on June 10, 1981. Willie Lee Capes, a Class 3 packer, began to work for Respondent on May 4, 1981. Ricky Lynn Huggins, whose job classification is not shown by the record, began to work for Respondent on August 18, 1980. There is no evidence that Baker or Capes ever engaged in any union activity. Huggins received a card from alleged discriminatee Elroy Hawthorne about late June; no supervisors were present at the time. There is no evidence that Huggins ever signed a card. He attended a union meeting on July 12, after his separation, but there is no evidence that he ever engaged in any other union activity.

2. **Respondent's July 11 assurances to the remaining employees**

On July 8, before effecting the July 10 layoffs, Respondent posted on the employee bulletin board a notice that a "general meeting of all employees" would be held at the plant at 9 a.m. on Saturday, July 11, "for the purpose of planning our move to the new plant. We wish to tell you of all the plans and want to include *you* in them. Please come and share them with us" (emphasis in original). Turnbull testified that this meeting had been planned with anticipation of quieting the remaining employees' fears in consequence of the July 10 layoff. The meeting was held on the clock, and the employees for whom this was a sixth day on the clock received overtime pay therefor. After making sure that all the employees had clocked in, Respondent served them coffee and doughnuts.

Turnbull started off by apologizing for the July 10 layoffs. He went on to say that Respondent had made only $8,000 in 1980; that the Turnbulls had twice had an opportunity to sell all the machinery; that they had decided instead to start a new cone-making business; that in moving to the new plant "we were making a new committment to the cone business"; and that all of Respondent's property had been put up for collateral to finance the new plant. Turnbull described the construction schedule, the schedule for delivering the new wrappers, and how these would operate. Then, he threw the floor open for questions. Some employees asked whether there were going to be any additional layoffs. Turnbull replied that there would be no more layoffs, that those present were the ones chosen to go, and that all of them would be going to the new plant. He stated that the July 10 separations had been effected because the separated employees had been tested on job skills, some of them had refused to do jobs, and some of them could not do jobs. He further stated that the employees in the room

at that time were the "Number 1 team and the cream of the crop." In response to other questions, he said that so far as he knew, after the plant moved there would be the same kind of hours; that he did not know whether there would be two shifts or three shifts, but hoped there would be at least two; and that he did not know where certain individuals would be working. In response to a question about whether Turnbull-Louisiana had a union, Turnbull said that it had a union contract which anyone there was welcome to read, that the Chattanooga plant had all the benefits of a union, that voting in a union would not do the employees very much good, but that whether they did so was up to them.[62]

An internal notation prepared by Denton and dated July 8, 1981 (3 days before this meeting) sets forth, as part of a "Plan to Follow," phasing out the second shift "when production allows." Under the "second-shift" entry are listed the names of alleged July 22, 1981, discriminatees Ellis, Jurrelle Griffin, Elroy Hawthorne, Hubbard, Prince, Varner, and Weaver, and also employee Summers, who was still working for Respondent on August 26, 1982, the last day of the hearing before me. Under the "sugar dept." entry are the names of alleged discriminatee Bush (terminated by a notice dated July 20, 1981) and alleged discriminatee Raborn, who was discharged in May 1982 for reasons not alleged to be connected to the late 1981 phaseout of the sugar cone department.

3. The July 12 union meeting; alleged further interference, restraint and coercion

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62. My findings in this paragraph are based on a composite of credible parts of the testimony of Prince, Elroy Hawthorne, Bush, Ellis, Weaver, and Turnbull. For demeanor reasons, I do not accept Turnbull's testimony that he said that he hoped there would be no more layoffs, and would try not to have any, but did not really know.

On Sunday, July 12, at least 23 persons attended a 2:30 p.m. union meeting at the union hall. Among those present were 10 alleged discriminatees who had been separated on July 10;[63] six employees alleged to have been discriminatorily terminated thereafter (namely, Bush, Ellis, Griffin, James Hawthorne, Prince, and Varner), and also employee Summers. While the meeting was in progress, someone said that general production manager Hood was outside driving around. Willie Caldwell, alleged discriminatee James Hawthorne, and Clarence Fitzgerald, Sr., went outside. They left the door open, and alleged discriminatee Prince went to the doorway and stepped outside. They saw a blue Chevrolet driving "real, real slow" in front of the union hall. When the driver saw the three men come out, he speeded up. Hawthorne and Fitzgerald remarked that the driver appeared to be general production manager Hood. Four or five minutes later, the same car drove "real slow" in the opposite direction on the street in front of the union hall. By this time, Hawthorne, Fitzgerald, and Caldwell had gone down the street to make a positive identification, and Caldwell said that he knew the driver to be Hood. Three or four minutes later, Hood drove slowly by the hall in the opposite direction. Hawthorne, Fitzgerald, and Caldwell thereupon waved him down, and he backed up and stopped. As he pulled in, he looked toward Prince, who "took off inside."

Hawthorne asked Hood what he was doing there. Hood said that he had just happened to drive by, that he was trying to find the flea market. Caldwell said that the flea market was two blocks away and a block over. Hood said that he had brought one of his relatives to the flea

63. Bates, Carolyn Caldwell, Finley, Peggy Fitzgerald, Bernice Hawthorne, Huggins, Sisk, White, Wills, and Zackery.

market. Hawthorne asked Hood why he wanted to "kid around." Hood looked toward the union hall and asked how it was going inside. Hawthorne said that he had just got there. Hawthorne and Caldwell told Hood that he was welcome to come in. Hood said that he was in "kind of a rush," and had to go back to the flea market. Inferentially, he then drove away. When word of his presence outside circulated through the union hall, an unidentified employee expressed apprehension about whether to sign the attendance sheet. Also, Cooper expressed doubt about whether to sign the sheet "because she wasn't so sure that she ought to have been there."[64] Cooper did sign, and apparently the unidentified employee signed also. Turnbull testified that he did not learn about the holding of this meeting until 3 or 4 weeks afterward, when he learned that Respondent was "going to be liable for some charges by the NLRB" because Hood had been seen in the vicinity of the union hall. Turnbull further testified that when he "found out from Tom Hood about Tom Hood on that situation, I had very strong counsel with him regarding that." Hood, who at the time of the hearing still worked for Respondent, did not testify.

While employee Summers was attending this meeting, his car, a black 1978 Pacer, was parked in the lot outside the union hall. On the following day, general production manager Hood told Summers to go talk to Denton about the Union. Summers said, "Why? . . . She can't fire me. I went to the union meeting on Sunday. It was my own free time." Hood said, "Well, you need to talk to her and talk to her now." Summers then called her on the plant intercom, and asked her to go to Hood's office, which is on the first floor. During the Hood-

64. The General Counsel contends (but Respondent denies) that Cooper was a supervisor during certain period relevent herein (see *infra* Part II J 1 a).

Summers conversation, which took place on the third floor, Hood told Summers to call him after Summers "got down there"; but Summers did not.

When Summers met with Denton later that day, he told her that he wanted to talk to her about the union meeting. She said "okay." He said that he had gone to the union meeting on Sunday, which was his "own free time," and that she could not fire him. She asked him whether he had signed a union card. He untruthfully replied no. She asked, "If a union came in, would you vote for it?" He said no. (Summers honestly testified to the belief that if a union came in, he would vote for it). At this point, Hood walked in, and remarked that "we don't need a union in here." He and Denton then started to engage in "sociable talking," whereupon Summers left the office.[65]

4. The bargaining demand and refusal

By letter to Respondent dated July 13, the Union stated that a majority of Respondent's production and maintenance employees had authorized the Union to act as their bargaining representative, and offered to submit proof of the Union's majority status to a mutually agreed-upon third party such as a clergyman or a member of the Federal Mediation and Conciliation Ser-

65. My findings in the last two paragraphs are based on the testimony of employee Summers, who as of the end of the hearing was still working for Respondent. Hood still works for Respondent, but unexplainedly did not testify. Denton denied asking Summers whether he would vote for a union or had signed a card, and testified that he volunteered that he had signed a card. She further testified that he said he was not joining the Union, but was just "curious," and had gone to the meeting because his wife or girl friend wanted him to go and see what was going on. Still according to Denton, she and Hood told him that Respondent wanted top-grade people, and their union sympathies made no difference. For demeanor reasons, and because of Hood's failure to testify, I credit Summers and discredit Denton. No contention is made that Hood's or Denton's remarks to Summers violated the Act.

vice. The letter went on to request Respondent to recognize the Union and to bargain with it. By letter to the Union dated July 16, Respondent declined to recognize the Union without a Board certification.

5. The allegedly discriminatory separation of Bobby Bush

Bobby Bush was hired by Respondent in March 1970. At the time of his separation, he worked as a maintenance man on the cone machines, primarily on the first floor. On June 29, 1981, while in a restaurant, he signed a union card (which states that he was on the first shift) and gave it to James Hawthorne. When Bush went to the union hall with James Hawthorne and Willie Caldwell on an undisclosed date, Hawthorne gave Bush some black cards which he distributed to employees Raborn and Percy Ricks (both of whom signed on June 30), Arvin Canada (who did not sign, so far as the record shows) and others.[66] About July 1, while Bush and general production manager Hood were in the basement checking some spare parts at Hood's instance, Hood said that he was afraid Bush was going to get terminated if he did not go to the office and tell Wayne Turnbull that Bush was sorry he had got "messed up with" the Union and it was a mistake to go over to the union hall. Hood went on to say that he did not want to get rid of Bush, that he was a good employee and Hood liked his work. Bush said that he would not do that, because he would be lying if he did; and he did not go to see Turnbull. Also in early July, Bush remarked to Hood that Clarence Fitzgerald, Sr., was a good worker and should not have been fired, and that "it looked like

66. As of April 1982 hearing, Arvin Canada, Ricks, and Raborn were still in Respondent's employ. As discussed *infra*, Raborn was discharged in May 1982, allegedly for union activity and testifying before the Board.

if Wayne Turnbull wanted a union he was going to get one." Hood said that Fitzgerald had indeed been a good worker.[67]

Bush attended the July 12 union meeting, and signed the attendance list there. About July 15, he went out of town on vacation. While Bush was on vacation, Hood approached employee Summers and said that Hood had tried to talk to Bush, and get him to talk to Denton, over Bush's "getting laid off," but Bush would not do it.[68] Upon Bush's return from his vacation about July 23, he picked up at the post office, in an envelope postmarked July 20, a separation notice also dated July 20, and stating that Respondent had ceased to employ him on July 15. The notice, signed by Mary Vane, contains under "Remarks" the notation "Termination of Employment. Production Phase-Out."

6. The allegedly discriminatory separations on July 22 (Donald Ellis, Jurrelle Griffin, Elroy Hawthorne, Athelene Hubbard, Juanita Prince, Wilma Ruth Varner, and Evelyn Weaver) and 24 (James Hawthorne)

On July 22, Respondent issued separation slips effective that day to seven more employees — Donald Ellis, Jurrelle Griffin, Elroy Hawthorne, Athelene Hubbard, Juanita Prince, Wilma Ruth Varner, and Evelyn

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67. My findings in this paragraph are based on Bush's uncontradicted testimony. Hood did not testify, although at the time of the hearing he was still working for Respondent. Accordingly, and after taking into account Bush's demeanor and his interest in the proceeding as an alleged discriminatee, I credit his testimony notwithstanding the statement in his pretrial affidavit that no supervisors had discussed the Union with him, and notwithstanding Hood's subsequent remarks to Summers about the matter (see *infra*). Bush testified that he had promised Hood not to say anything about their conversation. No contention is made that Hood's remarks violated the Act.

68. This finding is based on Summers' uncontradicted testimony. Hood did not testify.

Weaver. Like the July 10 and 20 separation slips, the July 22 separation slips were signed by Mary Vane. All of them contained a handwritten entry, under "Remarks," "Termination of Employment due to production phase-out." Those issued to Ellis, Griffin, and Elroy Hawthorne also contained a check in the box before "Discharged." The seniority dates of the employees terminated on July 22 ranged from 1965 (Weaver) to 1979 (Hubbard).

Turnbull testified that the second shift was eliminated because Respondent needed no further cones and was beginning to want to trim inventories in preparation for moving to the new plant. He further testified that in selecting employees for this layoff, Respondent decided to lay off the entire second shift, except that Cooper was retained because she had been assigned to a sanitation position in the new plant (although see *supra* Part II A 10). There is no claim or evidence that Respondent had previously made an effort to assign its least desirable employees to the second shift; as previously noted, during the July 11 employee meeting, Turnbull had described all of the then-retained employees as the "cream of the crop."[69] All of the persons included in the July 22-24 layoffs had signed union cards, as had Cooper, who was retained. Elroy Hawthorne, who had been working for Respondent since 1968, had been told by Denton the preceding May that he would be working in the packaging department in the new plant. When Hood gave a separation slip to Weaver, whose seniority dated from 1965, he said that "he was sorry it had to happen, but it was out of his

69. Although during prior years Respondent had from time to time stopped operating a second shift, the record indicates that the employees were selected for layoff on the basis of their seniority in the work force as a whole, and without regard to which shift they had been working on.

control, he couldn't have anything to do about it, and . . . maybe some day [the laid-off employees] could work for him again."

A document on Respondent's letterhead states that at the time of the layoff, Griffin, Hubbard, Prince, and Weaver were all "Packer Class #3." Respondent's payroll records show that Griffin, Prince, and Weaver were being paid at least $4.75 an hour, the rate of "Packer Class #1," the top rate — Griffin since April 1981,[70] Weaver since July 7, 1981; and Prince since July 8, 1981.[71]

By letter to James Hawthorne dated July 24, 1981, Turnbull stated, *inter alia*, ". . . on Wednesday, July 22, 1981, we closed down our second shift operation and permanently terminated all of the employees due to production phase-out. We therefore are including you in that process." Hawthorne had been working for Respondent continuously since 1968, and had also worked for Respondent for 22 months in 1953-1955. Because of an on-the-job injury, he performed no work for Respondent after about June 10, 1981. Before that time, he had been performing machine maintenance on the second shift. In late May 1981, Hawthorne had a discussion with Turnbull about Hawthorne's low ratings and his "attitude problems." Hawthorne understood from this counseling session that his job would be jeapardized if he did not improve. However, no contention is made that these alleged deficiencies had anything to do with his termination.

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70. Griffin's payroll record contains the entry "Class I Crackin Good." Employee Wills testified that Respondent eventually stopped giving raises to employees who were able to pack from this fourth-floor machine by themselves rather than (as previously) in pairs.

71. In view of these records, I accept Prince's testimony that she qualified on the combined machines, and discredit Denton's testimony otherwise.

7. Respondent's work force after the allegedly discriminatory separations in 1981

a. *Proportion of union card signers remaining on payroll immediately after the separations*

Of the approximately 63 persons on Respondent's payroll before the July 10-24, 1981, separations, about 36 had signed union cards and about 27 had not. Of the approximately 35 persons on Respondent's payroll as of July 29, 1981, about 12 had signed union cards and about 23 had not.[72] Of the 19 persons laid off on July 10, all of them named in the complaint, all but 4 had signed union cards (Baker, Capes, Huggins, and Wilcox); as previously noted, supervisor Denton had made a note that Wilcox had been discussing the Union with Lee, who signed a card and was also laid off on July 10. Of the 9 employees laid off between July 20 and 24, all had signed union cards. After the July 1981 separations, Respondent retained on its payroll all of the 4 employees named by Denton as having told her that a union was organizing employees. One of these (Payne) had signed a union card, and (so far as the record shows) the rest had not.

b. *Amount of work performed in old plant after the allegedly discriminatory separations and before the move*

On an undisclosed date after the July 22 separations, Respondent again started to operate a second shift at

72. These figures include floorladies but do not include admitted supervisors Denton and Broadwell or other admitted supervisors.

the old plant.[73] Turnbull testified that at the time Respondent effected these separations, Respondent anticipated having to work persons overtime thereafter, and that thereafter Respondent "occasionally" did so. Respondent's Exhibit 23, discussed below, asserts that Respondent ran overtime for 7 weeks, and went back to a regular schedule the first week in September. After the July 22 separations and until the plant moved, Mark Raborn regularly worked 1 hour a day longer than previously, and made cake-cone batter in addition to performing his previous duties of operating the sugar-cone machines.[74] The record otherwise fails to show anything about how much overtime was performed after the July 22 separations.

Turnbull testified that some time in June 1981, he and Dowling (who did not testify) prepared a computation which led them to decide that "at some point in time, when inventory dictated," running one shift 10 hours a day would be cheaper than running a second shift. Turnbull testified that a document received in evidence as Respondent's Exhibit 23 constituted a summary, submitted to the Board's Regional Office in the course of the investigation of the August - September 1981 charges, of the June 1981 computation. However, Respondent's Exhibit 23 tends to impeach Turnbull's testimony about his conference with Dowling. Because the original documents from which the exhibit was allegedly prepared have allegedly been destroyed, whether it accurately reflects such documents can be tested only on the basis of other record evidence. This

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73. This finding is based on employee Raborn's testimony. In the absence of supporting company records, and for demeanor reasons, I do not credit Turnbull's testimony that after these separations, Respondent never operated a second shift at the old plant.

74. My finding in this sentence is based on Raborn's testimony. For demeanor reasons, I do not accept Turnbull's testimony that about July 20, Respondent shut down its sugar roll cone machines.

evidence shows that Weaver was receiving $4.45 an hour until July 2, 1981, when her rate was increased to $4.85; but Respondent's Exhibit 23, allegedly summarizing a document prepared in June 1981, assumes the $4.85 rate. This evidence further shows that as of April 8, 1981, employee Griffin was being paid $4.75 an hour, but the document assumes, in effect, that her hourly rate was no more than $4.15. Moreover, the record shows that employee Pierce was in the shipping department until after the July 22, 1981, terminations assertedly based on Respondent's Exhibit 23's underlying documents; but the exhibit represents, in effect, that he was already performing production duties. Furthermore, Turnbull's testimony shows that supervisors Denton and Yvonne Broadwell were hourly paid and received time and a half for overtime; but Respondent's Exhibit 23 states that overtime work did not involve extra wage payments to them because they were salaried. Moreover, Respondent's Exhibit 23 does not really purport to show, as Turnbull testified it did, the relative cost of running one shift 10 hours a day and running a second shift. Rather, the document in fact purports to contain cost estimates of running one shift with five packers working 50 hours a week, one packer working 45 hours a week, and four machinists working 51 to 55 hours a week; as compared to running a second shift with five packers working 42 or 45 hours a week and four machinists working 53 to 55 hours a week. Also, the document contains rather more arithmetical and related errors than would be expected in a document on which a decision of such importance was to be based.[75] Further, Turnbull's prehearing affidavit

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75. Thus, the document contains internally irreconcilable estimates of Pierce's wages for a 41-hour and a 51-hour week. Also, the document contains arithmetical errors with respect to the total cost of packers' wages for a first shift of 45-50 hours and the difference between such wages and the wages for a 40-hour week.

subscribed to a letter to a Board investigator from Respondent's labor relations adviser which stated that Respondent had abandoned the second shift in July 1981 because it had been rendered unnecessary by Respondent's "highly increased productive capacity" at the new plant. However, Turnbull testified that all production was performed at the old plant until September 15, 1981, after this letter was written; that the move was not completed until about Christmas 1981; and that Respondent began a second shift at the new plant in late February 1982. Moreover, as previously noted, Turnbull admittedly told the employees on July 11, 1981, that he hoped there would be at least two shifts at the new plant. Accordingly, I reject Turnbull's testimony regarding his alleged June 1981 conference with Dowling. Further, I accord no weight to Respondent's Exhibit 23 to the extent that it purports to set forth the amount of overtime worked after the July 22 terminations.

c. *Hires and terminations after the July 1981 separations*

Respondent's Carter Street plant was Respondent's sole production site until about September 15, 1981, when Respondent began to move machinery to the Parmenas Road plant and to manufacture cones there. By about Christmas 1981, all of Respondent's production was being performed at the Parmenas plant, and the only employees working at the Carter Street plant were "scavenging" machinery, fixtures, and electrical equipment from that plant. As of late April 1982, Respondent was running 14 cake-cone machines — 2 banks of 6 machines each, and 2 side machines. Turnbull testified in late April 1982 that because of capital constraints, Respondent had no plans to put in the 4 additional cake-cone machines which Respondent had intended as of January 1981 to install in the new plant. The August

1982 record indicates that no additional cake-cone machines had in fact been installed. Also in late April 1982, Turnbull testified that Respondent then needed 8 production employees (exclusive of machine operators and batter mixers) per shift to operate 2 6-machine banks, and expected within a few weeks to eliminate 2 temporary inspectors; whereas operation of 12 machines at the old plant would have required a minimum of 14 production workers per shift. On cross-examination, he testified that the employee complement at the new plant on the first and second shifts, when at least 12 machines were operating, was 14 per shift. Utility person Mary Coots testified in late August 1982 that 8 persons (inferentially including a machine operator and a batter mixer) were being used to run one 6-machine bank. Turnbull testified in April 1982 that Respondent had bought a new sugar roll cone machine which would be installed in a few days.

Respondent began to operate a second shift at the new plant about late February 1982. During at least most of the time thereafter, Respondent operated at least 12 machines on each of these shifts. On March 29, 1982, Respondent initiated a third shift (a technological impossibility at the old plant) during which 6 machines were operated. As of April 28, 1982, 5 persons were working on that shift.[76] As of early May 1982, 7 production persons were working on that shift. As of late August 1982, following a layoff earlier that month, 6 production persons were working on that shift.

Two "Class 1" cone packers who were retained after the July 1981 separations were terminated, for undisclosed reasons, in September 1981 and March 1982,

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76. This finding is based on Turnbull's testimony. It is unclear whether he was referring to production workers only.

respectively. After the July 1981 separations, Respondent hired no full-time employees until late February 1982.[77] Between late February and late August 1982, Respondent hired 45 to 50 employees, all as temporary employees, a classification found ineligible to vote in the September 1982 election. These hires included 5 employees (Lee, Cranmore, Griffin, Prince, and Varner) whose discharge is attached in the complaint; in addition, job offers were made to alleged discriminatees Weaver and Hubbard.[78] Of these 7 employees, the first two who received job offers (which they accepted) were cone packers Lee and Cranmore. As previously noted, Respondent contends that practically all the persons separated on July 10 were selected for separation because of alleged deficiencies in their employment characteristics, but that the individuals separated later that month were selected for separation solely because they happened to be on the second shift. At the time Lee and Cranmore were rehired, the parties had been discussing a settlement (signed by Respondent, but eventually rejected by the General Counsel and/or the Union) which did not call for preferential hiring of the alleged discriminatees (including Lee and Cranmore) who had been laid off on July 10, 1981. While this proposed settlement was pending, the General Counsel told Respondent's labor relations advisor, Cy G. Lowe, that the Union was upset about Lee's and Cranmore's rehire, and that this was militating against the possibility of settling the case. Thereafter, Denton told Lowe that she was not familiar with his efforts to settle the case, and that she had recalled Lee and Cranmore because they were familiar with the work to be done, which (she told

77. One male part-time employee worked, in an undisclosed capacity, for a 3-week period ending in mid-October 1981.

78. No contention is made that any of these 7 individuals was ever offered reinstatement.

him) consisted of using up the old packaging material. Lowe told Denton to terminate them in order to avoid hampering efforts to settle the case. Both of them were terminated on March 3, 1982. Between March 3 and 10, 1982, Respondent sent letters to three (Griffin, Prince, and Varner) of the five cone packers whose July 22, 1981, separation is attacked in the complaint. These letters read, in part:

> Several jobs are beginning to open and we are pleased to ask you if you'd like to return on a temporary basis.
>
> The job will be, at present, on the second shift, however, we'll need your assurance that you'll be willing to be transferred to the third shift around April 1st.

The March 10 letters to the remaining cone packers (Hubbard and Weaver) whose July 22 separation is attacked in the complaint state, in part:

> We are anticipating a few job openings beginning early April and are pleased to ask you if you'd like to return to fill one of these positions. These jobs will be on a temporary basis and will be for the third shift.

Because Weaver was employed elsewhere, she rejected the work so offered her. Hubbard did not accept the work offered her.[79] The remaining three employees accepted the offer. Before beginning work, each of them signed the following typewritten statement, under Respondent's letterhead:

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79. Turnbull testified that so far as he knew, she did not respond at all. The copy of her letter received into evidence contains the notation, in an unidentified handwriting, "Called Mar. 15th wants to return when all back."

> Temporary Work.
> I understand that this job is on a temporary basis and it has been explained to me that this assignment may end at any time, and that this assignment is for the interim period covering start up of the new production lines.

Griffin returned to work on March 8, 1982, and as of April 27, 1982, was still working for Respondent. Prince returned to work on March 15, 1982, and was laid off on April 10, 1982. Her pay rate was $4.10, the rate of a "new girl," rather than the Class 1 pay of $4.75 (plus shift differential) she had been receiving before her July 1981 separation. While working for Respondent in 1982, she worked on the cartoner, on the taper, and on the transfer line, all of them jobs which continued to be performed in the plant after her April 1982 layoff. In addition, she worked on the counter before it was replaced by an automatic counter. The second-shift supervisor told her that she was "doing fine." Griffin credibly testified that she had no more trouble with any of these jobs than anyone else. Denton testified that Griffin did an excellent job for what Respondent had her to do. I perceive no factual predicate for Denton's testimony that Prince was unable "to do the automation."

Varner returned to work on March 8, 1982, and worked that day. Because of a migrane headache, on March 9 she called in sick and did not work. When she returned to the plant on March 10, Denton asked her whether she was still drawing unemployment compensation. Varner said yes. Denton said that because Varner would only be working at the plant for a week or two, she could take a layoff at that point and thereby continue to draw her unemployment compensation. Varner said that she would take an immediate layoff.

She thereupon signed a typewritten statement, dated the preceding day (March 9), that she had quit because the work to which she had been assigned was too hard. She had in fact been assigned on March 8 to do the same job which she had performed before her July 1981 layoff.

The work which had to be performed at the time Respondent started to hire these "temporary" employees" included cleaning out old packaging materials. However, the "temporary" employees also performed the same production work as the production workers who had been transferred from the old plant. Turnbull testified in August 1982 that when hiring 45 or 50 people as "temporary" employees, Respondent knew that it would need that many "for startups," and would probably end up with 10 or 12 "really good people that we would want to look at keeping." At the end of May 1982, Respondent gave wage increases to 7 or 9 of the employees hired as "temporary" employees, and (Turnbull testified) "they were qualified as permanent employees at that point." When asked in April 1982 why Respondent had hired inexperienced people from off the street when experienced employees were on layoff status, Turnbull testified that the work to be performed was "temporary work" (although he admitted that these "temporary" employees were "working on the production lines in various capacities where they're needed"). When asked substantially the same question in August 1982, Turnbull testified, " . . . when we did that, we had some problems with the National Labor Relations Board" (referring to the events, all of them before the settlement-negotiations collapse preceding his first testimony, which had led to job offers to all the cone packers whose presence on the second shift had allegedly caused their selection for layoff). When the General Counsel suggested to Turnbull, in April 1982, that Respondent recall the laid-off sugar roll cone employees

to work on the new sugar roll cone machine which was about to be installed, Turnbull in effect conceded that such laid-off employees were good workers, and that the skills which they would have to acquire on the new machine were different from those they had allegedly failed to acquire on the ganged cake-roll machines; but there is no evidence that such laid-off employees were ever recalled.

The July 22-24, 1981, separations attacked in the complaint included four employees (Bobby Bush, Donald Ellis, Elroy Hawthorne, and James Hawthorne) who were not cone packers. Turnbull testified in April 1982 that he had not offered employment to these four men because they were in the category of "baking operators, batter mixers, or machinists;" Respondent "had no new men in the baking operation since the layoff of July 22, 1981"; and Respondent had "hired no new people" for these jobs. The record shows that after this layoff, Respondent hired nobody directly into any of these jobs.

At the time of employee Ellis' July 22 separation, he was Respondent's only batter mixer, a function essential to Respondent's production. After Ellis' discharge, employee Pierce was transferred from the shipping department to batter mixing, a function which (so far as the record shows) he had never performed before. Pierce trained employee Raborn, who had been operating the sugar roll cone machines, to make cake-cone batter; and about late October 1981, Raborn started acting as batter mixer at the new plant. Pierce worked as batter mixer at the old plant until his discharge on December 11, 1981, for reasons not shown by the record. Just before the April 1982 transfer of employee Raborn from batter mixer to machine operator, "temporary" employee Wanda Hicks, who had been hired a few weeks earlier, was trained to replace him as a batter mixer;

and about early May 1982, she trained an unidentified "girl" as batter mixer (see transcript page 973, lines 7-8).

The jobs performed at the old plant by the other three men included in the July 1981 layoffs were rather similar to the jobs performed by the cone machine operators at the new plant. For undisclosed reasons, baking operator/machine operator Wallace White was terminated on March 8, 1982. Raborn was transferred from batter mixer to machine operator in April 1982, and was discharged in May 1982 for reasons not claimed to be lack of work (see *infra* Part II H, J 3 b (1)). In addition, between February 1982 and late August 1982, former shipping department employee Ernest Maxwell was trained as a batter mixer and (perhaps) a machine operator; former shipping department employee Johnny Hennessee was trained as a machine operator; and David Swann (who was classified at the old plant as a "baking operator" and initially worked at the new plant as a machine operator) was trained as a batter mixer and then as a packaging-machine operator.

As of March 22, 1982, Respondent had in its employ a total of about 53 persons, about 23 of whom had not been working for Respondent before the July, 1981, separations. Just before those separations, Respondent had about 63 persons in its employ.[80]

F. *The Representation Petition; the Request to Proceed; the Floyd-Pierce Conversations*

On July 27, 1981, the Union filed with the Board's Regional Office a representation petition in which the

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80. These figures exclude persons identified as supervisors on General Counsel's Exhibits 16-18.

Union sought certification as the bargaining representative of Respondent's production and maintenance employees. Under the Board's blocking-charge practice, the instant unfair labor practice proceeding suspended processing of the petition.

On December 11, 1981, for reasons not shown by the record, Respondent discharged employee Pierce, who had signed a union card on June 25, 1981. A month or two after his discharge, Pierce telephoned Jerry Floyd, who was allegedly a supervisor (see *infra*). In an effort to gain favor so Floyd would help Pierce get his job back, Pierce said, "...what if there were some people still working there that were involved with the Union?" Floyd said that this was "interesting." Floyd gave the same response to Pierce's remark, "...what if there were some people there that were bringing drugs on the job?" Floyd asked who these unionists and drug-bringers were. Pierce said that he would call Floyd back. However, because Pierce started to suffer from a guilty conscience about betraying the union activity of his friends at the plant, he did not call back.

On a date between March 13 and 16 (see *infra* fn. 81), when Pierce returned home, his sister told him that Floyd had telephoned and wanted Pierce to return his call. When Pierce did so, Floyd said that he thought Pierce was going to call back and tell him about the Union, which Floyd described in deprecating language. Pierce gave him no names, but did give physical descriptions, after which Floyd stated the names of the employees in question. One of the employees described by Pierce was Mark Raborn, and Floyd responded to this description "right off" by saying "Mark." Pierce also thus identified employees White (terminated several days earlier, on March 8; Floyd remarked that White was "gone") and Marvelene Hamler, terminated on

March 17.[81] Then, Floyd thanked Pierce and said that if Respondent started calling anyone back, Floyd would see if Pierce could not be one of the first ones called back. However, Pierce had not been called back as of late August 1982, when he testified before me.

On March 24, 1982, the Union filed with the Board a request to proceed with the election notwithstanding the pending unfair labor practice charges herein.

The parties stipulated that on July 29, 1981, Floyd was working for Respondent as a supervisor. Turnbull testified that on that date, Floyd was a supervisor over three or four men in the shipping department, but that as of April 28, 1982, there was only one person in the shipping department.

While working at the old plant before Pierce's discharge on December 11, 1981, Floyd wrote up load sheets and bills of lading, contacted "Hertz" about the trucks, and ran the shipping department. While Pierce was working there, Floyd was supervising employees Hennessee and Maxwell. At the time of the first Pierce-Floyd telephone conversation, Floyd was still working at the old plant with Hennessee and Maxwell. The second Pierce-Floyd conversation occurred when Floyd was working at the new plant, where he had an office which had a door connecting with Turnbull's office and was equipped with a desk and telephone for Floyd's use. At the new plant, Floyd at least sometimes physically loaded tractor-trailers. After moving to the new plant, Maxwell initially worked at the warehouse, inferentially under Floyd. On March 29, 1982, when the third shift was instituted, Maxwell was transferred from the

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81. No contention is made that her termination was unlawful. I refer to its date in order to establish the time frame of this Pierce-Floyd conversation.

warehouse to making batter on that shift. By August 26, 1982, Hennessee was running machines on the third shift. On that date, employee Summers credibly testified that someone named "Chuck" "used to" work in shipping with Floyd;[82] and that a male employee, whose name Summers did not know, worked with Floyd in the shipping department. I conclude that the record preponderantly shows that Floyd was a supervisor during his two conversations with Pierce.

G. *The Allegedly Discriminatory Discharge of Nella Broadwell; Alleged Further Interference, Restraint, and Coercion*

In late February 1982, supervisor Yvonne Broadwell asked her sister-in-law, Nella Broadwell, whether she wanted to come to work for Respondent "temporarily" for 30 or 40 days. Nella said that she would, and reported to work about February 26. She worked a full day before filling out an application form and signing a form which, inferentially, stated that she was a temporary employee only.

Each conveyor line at the new plant conveys cones produced by a group of six machines tended by a single machine operator. Beginning about early March 1982, Nella Broadwell was a first-shift inspector on Line 2, with some duties on Line 1. About April 1, 1982, Raborn became the first-shift operator on Line 2. Summers was the first-shift machine operator on Line 1 during most of this period, but he sometimes operated the Line 2 machines. On April 4 and 6, 1982, subpoenas to testify before me on April 13, 1982, were received by Summers and Raborn, respectively. On Friday, April 9, they

82. Probably about late March 1982, an employee named Charles Wagenen started to work for Respondent.

showed the subpoenas to general production manager Hood, and told him that they would have to be "off" for the hearing. In April 1982, and inferentially after these employees' report to Hood, Yvonne Broadwell told Nella Broadwell that Raborn and Summers would lose their jobs because they were testifying for the Union, and that Raborn, especially, would lose his because "they thought he was an informant."[83] Nella asked why "they" would do that. Yvonne replied, "Well, that's just the way the Company does."[84]

During this same period, Nella telephoned Yvonne that Nella had heard she was to be subpoenaed to testify in the instant proceeding, and asked whether she had to go. Yvonne replied yes, if she was subpoenaed. Nella said that she knew knothing about the case. Nella was subpoenaed, and came to the April 1982 hearing;[85] but did not testify until the following August, when she testified in connection with, *inter alia,* her own April 22 discharge.

The cone inspector is supposed to tell her machine operator if a particular machine is producing overcooked, undercooked, or otherwise defective cones. Production manager Denton and utility person Coots, as well as other witnesses for both the General Counsel and Respondent, credibly testified that a cone inspector is ordinarily permitted to talk to other employees while she is working, so long as she remains at her work station. A machine operator's work station is about 3 feet from the work station of the inspector on his own

83. Because of a hearing continuance due to Turnbull's unexpected hospitalization, Raborn and Summers did not testify until April 27, 1982. Yvonne Broadwell testified for Respondent on the following day.

84. My findings as to the conversation between the Broadwells are based on Nella's testimony. For demeanor reasons, I do not credit Yvonne's denial.

85. She was sequestered during the April 13 session, which preceded her discharge; but attended at least part of the April 26-29 session, after her discharge.

line, but may be 50 to 100 feet from the work station of the inspector on other lines. From time to time, when a machine operator's machines are all functioning properly and none of the other employees needs assistance, he has no work duties to perform. During such intervals, he is ordinarily free to talk to any inspector he wishes.

After becoming a cone inspector in early March 1982, Nella talked from time to time with Summers about matters which included but were not limited to job problems. After Raborn became the machine operator on Nella's line in mid-April 1982, from time to time she engaged in similar conversations with him. These conversations with Summers and Raborn were more frequent when they were working on Nella's line. Laying to one side alleged April 9th and 16th incidents, discussed *infra,* there is no evidence that Nella was engaged in such discussions during working hours in locations other than her work station. During a telephone conversation initiated by Nella Broadwell, Yvonne Broadwell asked Nella to stop talking to Summers and Raborn so much. Nella said that general production manager Hood should tell that to Summers and Raborn.[86]

Thereafter, on April 16, while Nella Broadwell was standing in her usual work area, Yvonne Broadwell approached her and told her that Denton had sent Yvonne back there to tell Nella that she was spending too much time off her job. Nella said, "Where have I been?. . . I haven't been anyplace." Yvonne said that she did not

86. Yvonne Broadwell testified that she made this remark becaue employee Nina Clark, who was supposed to move cones to another belt after Nella had inspected them, had complained that too much scrap was coming down in the cones. Clark testified for Respondent, but was not asked whether she had made any such complaints at this time.

know, that Denton had asked Yvonne to look toward Nella but Yvonne had not seen anything. Nella said, "Well, okay, I won't be off my job." Yvonne then left the area.[87]

Immediately after Yvonne's departure, Summers, whose Line 1 machines were working properly, came over to Nella on Line 2 and asked what was wrong. Nella said that Denton had sent Yvonne over to tell Nella that she was spending too much time off her job, and that Nella had been forbidden to talk to him and Raborn. Summers said, "Well, it's only because I'm here."[88] The two continued to chat for 5 or 10 minutes, during which period Nella continued to work.

About 15 minutes later, Yvonne approached Nella and said that Denton was reading Nella's lips. Yvonne went on to say that Denton had said, "Look, [Nella's] telling Jerry [Summers] she can't talk to him." Nella said that she had not been telling Summers that, and asked to talk to Denton. Yvonne said that Denton thought Nella and Summers were talking about the Union. Yvonne said that she would get Denton back there, but told Nella not to mention the Union to Denton. Nella said that she would not.[89]

When Denton approached Nella a few minutes later, Nella said that she had not been off her job. Nella said, "You might have seen me walk away one second," stuck

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87. My findings in this paragraph are based on credible parts of the Broadwells' testimony. For demeanor reason, I do not accept Denton's testimony that this incident occurred about April 9, and that Nella had been talking about 50 feet from her work area with Raborn, Summers, and Line 1 inspector Leila Moore. Cf. *infra* fns. 90, 91, and attached text; see also, *infra* fn. 110.

88. My finding in this sentence is based on Nella's testimony, which was not received to establish the truth of Summers' assertion.

89. My findings in this paragraph are based on a composite of credible parts of the Broadwells' testimony. For demeanor reasons, I do not credit Yvonne's denial of the remark about lip reading.

up a finger, and said, "One time, when I wasn't doing my job."[90] Denton gave her a look which Nella interpreted as accusing her of telling a story. Nella again stuck up her finger and said "One time." Nella asked Denton to tell things to Nella directly instead of sending messages. Denton agreed to do so.[91]

On the following day, a Saturday, Nella telephoned Denton, said that she thought there was more to "this" than just spending time off her job, and asked what was really involved. Denton said, "Nell, I can't say that word." Nella said, "Well, I think you think that we're talking about a union." Denton said yes, that "I have so much trouble back there in the back that I have to constantly keep my eye on it. . . I just can't take any chances." Nella said that she and Summers had not been talking about a union. Denton said that "they" had already got Leila Moore on "their side" (cf. *supra* fns. 87, 90), that Denton had been speaking of Raborn and Summers, and that Mark Raborn and Summers had approached employee Wanda Hicks.[92]

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90. On this occasion, Nella had walked back and said something to Moore, the inspector on Line 1.

91. My findings in this paragraph are based on Nella Broadwell's testimony. Denton testified that Nella said that she had been wrong to leave her machine and asked Denton to tell Summers and Raborn not to talk to her. Still according to Denton, she said that she would have general production manager Hood talk to Summers and Raborn, and in fact so requested Hood a few minutes later. Hood did not testify, and Raborn denied that Hood gave him such instructions. Denton did not testify that she took any action with respect to inspector Moore, who according to Denton had taken part in the alleged Summers-Raborn-Nella conversation (see *supra* fn. 87). For demeanor reasons, I credit Nella Broadwell over Denton as to the conversation described in the attached text.

92. A notation by Denton dated April 21 states, *inter alia*, that Hicks had said that "Mark was talking to her about union."

My findings as to the April 10 Nella-Denton telephone conversation are based on Nella's testimony. Denton testified that Nella said that she felt Denton did not want Nella to talk to Summers, Raborn, and Moore because Denton thought they were "talking union"; Denton said that she was not allowed to say that word, did not even think about it, and did not want to talk about it;

On April 21, a fellow employee on the same line as Nella told her that Denton had said something about the two employees' talking. That evening, Nella again telephoned Denton and said, ". . . evidently, this thing is still on your mind." Denton said that it was, and told her not to say even "good morning" to Summers and Raborn, because "it would just encourage them." Nella said, ". . . if you don't want me talking to the boys or the boys talking to me, I won't go out of my way or out of my area; but you'll have to tell them to not come where I am." Nella said that Denton did not have to worry about her talking about a union, because Nella "wouldn't have any part of a union." During this conversation or the conversation described in the preceding paragraph, Denton told Nella to tell Summers and Raborn that they had work to do, to which Nella replied that this was not her place.[93]

After clocking in on the following morning, April 22, Nella Broadwell went by the office and asked Denton whether everything was "cool." Denton said yes. Nella asked whether Denton had told Raborn and Summers not to talk to Nella. Denton said that general production manager Hood had told them (cf. *supra* fn. 91). Nella then went to her work station. Raborn came over, and Nella asked him whether Hood or Denton had told

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Nella said that the three employees were not talking about the Union; Denton said that she did not care, so long as Nella's job was taken care of and she did not leave her work area; Nella asked Denton to tell Summers and Raborn not to talk to Nella; and Denton said that she would again ask Hood to tell that to Summers and Raborn. Still according to Denton, she thereafter brought the matter up again with Hood (but see *supra* fn. 91). For demeanor reasons and in view of Denton's notation about Raborn and Hicks, I credit Denton's version of this conversation only to the extent that it is corroborated by Nella Broadwell.

93. My findings in this paragraph are based on Nella Broadwell's testimony. For demeanor reasons, I do not accept Denton's testimony that no telephone conversation took place on April 21, or that Nella never said she was not going to have anything to do with the Union.

Raborn and Summers not to talk to Nella. Raborn said, "No, why?" Nella said, "Well, I can't talk to you, but Betty or Tom is to talk to you and tell you why." Later that morning, Nella again asked Raborn if Hood or Denton had said anything to Raborn about not talking to Nella, and Raborn again said no.[94]

That morning, Denton and employoee Clark were working together, at least off and on, at a point on Nella's conveyor belt beyond her work station and within her field of vision. As they worked, they were laughing and talking together. Late in the morning, Broadwell approached Denton and said, "Betty, what is this?...Y'all have been running your mouth all morning, and I'm back here, I'm not even allowed to say good morning to the people who work around me...Y'all have been talking all morning long..." Denton said, "We're doing our job." Nella said that she had been doing her job, too; and that if Denton said otherwise, she was telling a "damn lie." Denton said that the fact that some cones were coming down backwards showed that Nella was not doing her job. Nella replied, "Betty, that's not true and you know it." Nella then returned to her work station. During this conversation, Nella placed her hands on her hips, and made no menacing gestures. She raised her voice above normal (but did not shout) and put some hostility into it; she was admittedly "very perturbed."[95] It is uncontradicted that cones on the conveyor belt sometimes "flip over," and assume a backwards position, after leaving

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94. My findings as to the Raborn-Nella conversations are based on her testimony, which was not received to show whether Raborn had in fact received such instructions. Cf. *supra* fn. 91.

95. My findings as to this incident are based on Nella's testimony and credible parts of Denton's and Clark's testimony. For demeanor reasons, I do not credit Denton's and Clark's version of the conversation, or their description of Broadwell's tone of voice and gestures.

the inspector's work station.

After this incident occurred, Denton went to Turnbull's office. Denton testified that she told him she was going to fire Nella Broadwell for insubordination and he said, "Go ahead." Turnbull testified that Denton said that she did not know what to do, that Nella Broadwell had called her a few profane words including "goddamn," and that there was a problem because of Nella's kinship with Yvonne Broadwell. Still according to Turnbull, he told Denton to make her decision without regard to kinship, she said that she thought Nella should be discharged, and he said that he would back Denton on whatever she decided to do. Sales manager Sanderbach, who according to Turnbull was present during this conversation, was not called as a witness. Turnbull further testified that about noon, Denton told him that she had called in a second-shift inspector to replace Nella, and was terminating her and paying her for the day as soon as the replacement came in. Denton was not asked about his noontime conversation.

Nella continued to work until the time when she normally went to lunch. Yvonne then came to Nella's work station, took Nella's place, and said, "Go on, now." Nella asked where she was going. Yvonne said, "Break, I guess. . . Go on." Nella then walked in a direction which led her past the production office. As she neared the office, an unidentified employee pointed toward her. Denton, who was in the office, nodded her head. Nella stopped at the office door and asked whether Denton had something for her. Denton opened the desk drawer, took out an envelope containing Nella's paycheck and termination slip, and gave them to Nella. The termination slip stated that Nella had been discharged for insubordination. Denton said that Nella had done this to herself, that her work was good, and that Respondent

had had no intention of laying her off. Nella said, "Betty, if you stop and think about this, how do you think I felt back there, this rule, like, just applied to me?" Nella said that she was a "victim of circumstances," and that if she had not been working in that position, this would never have happened. Denton agreed that this was probably true.[96]

In July 1982, Nella told Turnbull that she had told Denton that Nella was doing her job, and had further told Denton that if she said otherwise, she was telling a "damn lie." Nella told Turnbull that she felt as if she had been wrong in losing her temper and cursing Denton, and that Nella had been "very mad" at Denton personally and still disliked her. Turnbull said, "I know. We all get mad." Nella said that she held nothing against Turnbull or Respondent because of what was taking place, and asked whether there were any hard feelings between Turnbull and herself. He said no. Nella asked if Respondent would rehire her if she applied. Turnbull said that he and sales manager Sanderbach would possibly reconsider it.[97] She said that she was thinking about dropping her charges in order to prevent her sister-in-law, Yvonne Broadwell, from entertaining hard feelings against Nella, and asked whether withdrawing the charges would make any difference. Turnbull said that she should do whatever she felt she ought to do, it made no difference to him.[98]

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96. My findings in this paragraph are based on Nella's testimony, partly corroborated by Denton. To the extent that their testimony differs, for demeanor reasons I credit Nella.

97. Respondent's labor relations adviser had told Turnbull not to make her any promises.

98. My findings in this paragraph are based on a composite of credible parts of the testimony of Turnbull and Nella Broadwell. For demeanor reasons, I do not accept Turnbull's testimony that Nella said she had used "some abusive words" to Denton but did not tell him exactly what they were.

H. *The Allegedly Unlawful Discharge of Mark Raborn*

1. Events leading up to Raborn's discharge

Mark Raborn began working for Respondent on December 31, 1979. Until an undisclosed date after the July 1981 terminations, he operated the sugar cone roll machines, including making batter therefor, under Hood's supervision. In August 1981, at Hood's request, Raborn learned how to make batter for the cake cone machines. Thereafter, and until about the end of March 1982, he worked as a batter mixer.[99]

About late March 1982, Raborn began to train other employees (including Swann, Maxwell, and Hicks) to make batter. Hicks credibly testified that Raborn was very cooperative as a trainer, and did everything she asked him to do. On April 14 (see *infra* fn. 110), Raborn began helping Summers operate the Line 1 cone machines on the first shift. A week later, Raborn was assigned to operate the Line 2 machines on the first shift. Line 2 cone inspector Nella Broadwell credibly testified that Raborn was always very good about helping her, and she never complained to management about his work.

As previously noted, in mid-March 1982 former employee Pierce told supervisor Floyd, at Floyd's urging, that Raborn was involved with the Union. On April 9, Raborn advised general production manager Hood that Raborn had been subpoenaed to testify at the instant unfair labor practice hearing. Supervisor Yvonne Broadwell told employee Nella Broadwell that Raborn

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99. While operations were being moved to the new plant, he assisted in the move, helped out the pipefitter, and performed various odd jobs.

would lose his job because he was going to testify for the Union at the trial. Raborn attended the unfair labor practice hearing on April 13. On April 16 and 17, supervisors Yvonne Broadwell and Denton told employee Nella Broadwell that Raborn was thought to be making favorable remarks to other employees about the Union, and urged Nella not to talk to him. On April 21, Denton put into Raborn's file a memorandum which stated, *inter alia,* that employee Hicks had said that Raborn was talking to her "about union" and had said that he hated Denton because she was "the cause of the other people getting [laid] off."[100] The representation case hearing was held on April 23, 1982. Raborn attended the unfair labor practice hearing on April 26, 1982, when his union card, dated June 30, 1981, was received into evidence. On the following day, April 27, 1982, he testified on the General Counsel's behalf. A few days later, Hood told him that Hood hated to do it, but he was going to have to transfer Raborn from the first to the third shift. Raborn was so transferred effective as of the shift which began at 10 p.m. on Thursday, May 6, and ended at 7 a.m. on Friday, May 7.[101]

When Raborn reported for work on the evening of May 6, floorlady Mary Coots told him that he was supposed to act as both inspector and operator with respect to the six machines which ran during the third shift. Raborn told her that he was unable to perform both functions, and that another employee was needed to act as inspector; Turnbull testified that acting as cone inspector with

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100. Hicks testified for the General Counsel, but was not asked about this matter. Raborn credibly testified that he did not tell Hicks he hated Denton, but may have told Hicks that he did not like Denton because of her role in the 1981 separations.

101. The date is established by Raborn's timecards. The somewhat different testimony of Respondent's witnesses is discussed hereafter.

respect to six machines was a "full-time job." Coots said that she had been told to give Raborn such instructions (without saying who had given them), that she agreed he could not perform both functions, and that she had tried to get "them" to assign an inspector, but to no avail,[102] That night, when one of the machines was sticking and Raborn was spending 10 to 15 minutes fixing it, he was unable simultaneously to perform the inspector's function, with respect to the cones still being produced by the other five machines, of flipping the cones over and keeping them from hanging up. During that shift, Raborn's machines produced 306 "48 count" cases of cones.[103] The average production of "48 count" cases of cones between the night shift ending on April 23 and the night shift ending on May 6 (the last night shift before Raborn started to work on the night shift) was about 322 per shift.[104]

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102. My findings in this sentence are based upon Raborn's testimony, received without limitation or objection. See *American Rubber Products Corp.* v. *N.L.R.B.*, 214 F.2d 47, 52 (C.A. 7, 1954); *Today's Man*, 263 NLRB No. 41 (1982). In any event, Coots' statements bind Respondent in view of my finding (infra Part II J 1 b) that she was a supervisor. See Rule 801 (d) 2(D) of the Federal Rules of Evidence.

103 This finding, and subsequent findings regarding the number of cases of cones produced on the third shift, are based on Turnbull's testimony. He testified that in describing company records with respect to third-shift production, he did not know whether the date on the records was the date the shift began or the date it ended. The night shift does not work from Friday night to Saturday morning or Saturday night to Sunday morning, but does work from Sunday night to Monday morning. Because Turnbull referred to records with Monday dates (April 26, May 3, May 10, and May 17) but not to records with a Saturday or Sunday date, I infer that the date on the records is the date when the shift ended.

104. During this period, production ranged between 271 and 395 "48 count" cases per shift. Turnbull also testified to the third-shift production of "48 count" cases during three shifts after Raborn's discharge at the end of the night shift which ended on May 12. For reasons not shown by the record, he did not specify the production during the shift which began on May 13 and ended on May 14, although he did specify the production during the preceding shift and the two subsequent shifts. he testified to production between 317 cases (during a shift at least initially run by production manager Hood) and 344 cases (during a shift run by Turnbull), with an average of about 331.

During the shift which began on Sunday, May 9, and ended on Monday, May 10, there was still no inspector on the third shift, and Raborn still had to perform the inspector's duties as well as operating the machines. Because he was unable to perform both functions, he eventually turned off two of the six machines.[105] He again told Coots that an inspector was needed, and she again agreed but stated that she had been unable to obtain one and had been told to have him perform both functions (see *supra* fn. 102 and attached text). That shift, his machines produced 386 "36 count" cases. During the third shifts which ended on May 3, May 4, and May 5 (all before Raborn was transferred to the third shift), production of "36 count" cases had averaged 338, with a range of 252 to 468. When first-shift batter mixer Hicks started work on the morning of Monday, May 10, she complained to Denton that third-shift batter mixer Maxwell had been leaving the floor of the batter room wet with flour and water for "not just a day or two. Days." Denton replied that Maxwell was having to go on the machines and run Raborn's job, because Raborn would not do his job. Denton said, ". . . you know that [Raborn] is into this court business, and he has the attitude that we can't touch him." At this time, Raborn had worked a total of two night shifts.

During the shift which began on Monday, May 10, and ended on Tuesday, May 11, Denton was present. She told Raborn that his only responsibility would be to operate the machines, and someone else would perform inspection duties. The cone machines ran "perfect" that night. At one point, Raborn left his machine and helped employee Swann repair a wrapper which had broken down. The morning of May 11, general production

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105. Respondent's records apparently state that Raborn operated eight machines during that shift. Because Raborn was physically present during that shift, I accept his testimony that he operated six machines.

manager Hood commented that the machines had run "awful good," and "That's how they should run all the time." Respondent failed to put in any evidence about the number of cases of cones produced during that shift.

An inspector was also on duty during the shift which began on Tuesday, May 11, and ended on Wednesday, May 12. That night, the machines ran "awful." Raborn could not figure out what was the matter with them. Wrapper Swann, who had been a machine operator, came over to help Raborn, but he could not figure out the problem either. Raborn worked "solid," and did not take a break at any time during the shift. When general production manager Hood came in the following morning, some of the machines and cones were still sticking, and the floor was dirty because Raborn had had no chance to sweep it. While Raborn was working one of the machines, Hood approached him and said, "I hate to do it, but I'm going to have to let you go." Hood said that Raborn could come back later and pick up his check. Raborn's separation slip states that he was discharged because "not doing assigned work properly. Continued efforts to change his work habits to no avail. Extremely poor attitude towards cooperation with fellow workers." Production on that shift was 313 "48 count" cases, about two and a half percent less than the average just before Raborn went on the third shift.

Raborn's personnel folder contains notes critical of his performance on June 30, 1981; July 1, 1981; and November 8, 1981. The record fails to show the kind of incidents described in these notes, but they were admittedly not for poor work, and no contention is made that such incidents played any part in his May 1982 discharge. The only other such note in his personnel folder was a memorandum regarding an incident on April 30, 1982, when he was advised that his supervisors

included Denton as well as Hood (see *infra* fn. 109). No contention is made that this incident played any part in his discharge. Turnbull testified that supervisors followed a practice of making notes of, *inter alia,* "any instances of any information of any discussion or any complaints or anything to do with the operation, anything that an employee would come and complain about another employee, or anything that was a problem . . . or running a chronological history of offense . . . as a matter of routine, this is done daily, regardless of what the discussion is, or what the subject is."

2. Reasons for credibility findings

My findings as to the events on the third shift after Raborn's transfer thereto are based almost entirely on Raborn's testimony. His testimony that no inspectors were working during the shifts which began on May 6 and 10 is corroborated by Denton. I do not credit Coots' testimony otherwise. She initially testified that someone whom she identified as "Rita" was an inspector on those two shifts. There is no other evidence that anyone named "Rita" was then in Respondent's employ. When asked whether Coots had told a Board agent that there was only one night when Raborn had to inspect the cones as well as run his machine, she replied that the Board agent was "supposed to have changed that, and I believe he did. I said [Raborn] done it for about 5 minutes, if he done it that long. He walked off and left it, and Ernie [Maxwell] came and took it." Her affidavit in fact states that Raborn had to inspect the cones and run the machines for 20 to 25 minutes. Moreover, when asked whether she recalled Raborn's telling her that she needed a full-time inspector on the third shift, she replied that she did not recall this but "I could have and I just don't remember all of it." Maxwell and employee

Clark, who also worked on that shift at this time, testified for Respondent, but were not asked about this matter. As to this matter, I discredit Coots, for demeanor reasons and other reasons discussed *infra.*

Turnbull testified that the morning after Denton worked on the third shift with Raborn, she told Turnbull that she had been "nudging" and "talking to" Raborn, and had been "on him," and he was working. There is no evidence that Denton had in fact engaged in this conduct with respect to Raborn, and she was not asked about her alleged conversation with Turnbull. For these and demeanor reasons, I discredit Turnbull's testimony in this respect.

Turnbull testified as follows: About 3 a.m. on May 12, he and Dowling paid a surprise visit to the plant. Employee Clark, who was walking out the door to quit, asked to speak to Turnbull, who thereupon asked Dowling to go back to the machines and help out while Turnbull talked to Clark. Clark complained about Raborn's alleged "attitude" and his alleged action in standing around with his arms folded while other employees needed help. Turnbull said that Respondent would take care of the problem. Then, Turnbull observed that four machines were "down"; three were being worked on by Dowling, Maxwell, and Swan, respectively; and Raborn was standing there watching. Maxwell said that he, Swann, and Dowling were trying to get the machines running, but Raborn was giving no help. Similar remarks were made by Swann. Inferentially referring to Raborn, Coots said, "I've tried everything I know how to do, but I can't get anything done. . . I've talked to [Denton] and [Hood] about it a lot of times, but they say they're going to do something about it; but . . . it just gets worse." Turnbull thereupon went to Hood in his office and strongly urged him to discharge Raborn.

Maxwell testified for Respondent that on this occasion Dowling fixed the machines himself; and Maxwell did not testify to Turnbull's presence. Clark did not testify to Dowling's presence[106] or that she had been about to quit; and her version of her complaint to Turnbull differs somewhat from his. Coots' testimony suggests that Turnbull may have been there that evening (see *infra* fn. 107), and she testified that Dowling was present, but she testified that it was Dowling who fixed the machines, and did not testify that this was done by either Maxwell or Swann. She stated in her prehearing affidavit that she had never complained to Turnbull about Raborn's attitude or work,[107] and that she had told Denton once or twice that she had told Raborn a machine was sticking.[108] Hood and Dowling did not testify. In view of the foregoing discrepancies and failure of corroboration, I do not accept Turnbull's and Coots' testimony that Turnbull and Dowling visited the plant on this occasion. Moreover, in view of the inconsistencies between Coots' prehearing affidavit and her testimony, and for demeanor reasons, I do not credit her testimony about her alleged complaints about Raborn to Turnbull or Hood; her testimony that during machine breakdowns on the third shift, Raborn would make no effort to repair them even when he was "hollered" at, but would merely sweep the floor; or her and Denton's testimony about Coots' complaints to Denton. Rather, I credit Raborn's denials that he engaged in such conduct.

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106. Her possible inability to recognize Dowling would not have interfered with her ability to corroborate Turnbull's testimony about his alleged conversation with Dowling in her presence.

107. However, at the hearing she testified that she complained to Turnbull about Raborn the day he was fired.

108. However, Coots testified at the hearing that she complained "every day" to Denton about Raborn's third-shift performance. Denton gave similar testimony.

Turnbull testified about an alleged meeting with Raborn which was attended by Turnbull, Denton, and Hood, and during which Turnbull criticized Raborn's attitude, his alleged laziness, and his alleged inattention to his supervisors. Denton testified to a "counselling" meeting attended "somewhere in April" by herself, Turnbull, Hood, and Raborn. Hood did not testify. I credit Raborn's testimony that this meeting did not take place. Turnbull testified that this meeting occurred after a meeting during which Hood, in Denton's presence, told Raborn that both Hood and Denton were Raborn's supervisors.[109] Denton's written summary of this conference, which Turnbull admittedly did not attend, is dated April 30, 1982, 2 weeks before Raborn's discharge. However, Turnbull testified that the alleged subsequent meeting with Raborn which Turnbull did attend occurred 3 or 4 weeks before Raborn's discharge. Moreover, Raborn's personnel file contains no reference to a conference including Turnbull, although the file does contain Denton's summary of the April 30 conference. Furthermore, Turnbull's prehearing affidavit does not allege that during this meeting Turnbull said anything other than that Raborn had two supervisors, Denton and Hood, and would have to operate under that system.

Turnbull testified that when Hicks started to work as a batter mixer (according to Turnbull, in mid or late

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109. This Hood-Denton-Raborn meeting was occasioned by a report to Denton from floorlady Wanda Housely that when Housely told Raborn that Denton wanted him to get back to his work area, he replied that Denton was not his boss, and that his boss was Hood. Raborn credibly testified that in February 1981, Turnbull had advised him and several other male employees that Hood would be in exclusive charge of the men and the machines, and Denton would be in charge of the women and the packing. Turnbull and Denton testified that management so divided supervisory responsibilities in February 1981; I reject as improbable his denials of a meeting where employees were so advised.

March 1981),[110] she complained that Raborn and "the boys" kept a messy batter room, she could do a better job, and she wished that they would get out of the batter room so she could do her job right. I do not accept Turnbull's testimony in this respect. He testified that at the time Hicks allegedly made such complaints, she was the only person who worked as a batter mixer, and that keeping the batter room clean was her responsibility. Furthermore, he testified that after Respondent instituted a third shift on March 29, Raborn was no longer working as a batter mixer, and that the batter mixer on the shift preceding Hicks' shift was employee Maxwell, who was not written up for this alleged offense; the union cards received in evidence did not include any card signed by him, and he testified that he opposed a union. Moreover, Hicks credibly testified that Raborn kept the batter room clean.

Turnbull testified that beginning in early April 1982 and continuing until Raborn's May 12 discharge, Swann, Turner, and "everybody that worked with Raborn" complained to Turnbull that Raborn was not doing anything; and that unidentified employees told Turnbull that Raborn said he was going to continue to do poor work on the third shift until he was returned to the first shift or discharged. Turnbull further testified to reports from Hood and Denton about complaints from employees regarding Raborn's bad attitude. However, of the employees named by Turnbull as complaining to him, the only one who testified was Maxwell, who testified that he never talked to Turnbull about Raborn. Moreover, Hood did not testify at the hearing, and Den-

110. However, Hicks testified that Raborn started to train her as a batter mixer a few days after her March 23 hire. Raborn testified that he so trained her on April 12, so that she could substitute for him when he went to the hearing on April 13 in response to his subpoena. As to this matter, I regard the employees' recollection as superior to Turnbull's.

ton did not corroborate Turnbull's testimony about her alleged reports to him about Raborn. In view of this contradiction and absence of corroboration, and for demeanor reasons, I discredit Turnbull's testimony about the reports allegedly made to him about Raborn.

Denton testified that while Raborn was on the third shift, Maxwell complained "constantly" and "about every day" that Raborn "was standing with his hands folded all the time" and Maxwell could not get his own work done "for helping [Raborn] do [Raborn's] work." Maxwell testified that he had complained to Denton, that Raborn was not doing his job and was making it harder on everybody else, every other evening for the entire time Raborn was on the third shift; Maxwell's prehearing affidavit refers to one complaint only. Maxwell further testified that when discharged, Raborn had been on the third shift for about 3 weeks; but Raborn's timecards show that he was on that shift for less than a week before his discharge. Moreover, Maxwell did not testify that he operated the cone machines while Raborn was the machine operator on Maxwell's shift;[111] and he initially testified that the amount of relief work Maxwell had to perform for the female employees when Raborn was the machine operator was "not really" any different from the amount of relief work which Maxwell had performed when Raborn's predecessor, Swann, was working as the machine operator on that shift.[112] Also, batter mixer Maxwell initially testified that he had time

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111. Maxwell had initially worked in the warehouse, and had been made a batter mixer after being trained by Raborn. Maxwell testified at one point that he had never operated a machine, but immediately thereafter testified that "I'm operating them now. I'm helping out...This is before Raborn's discharge."

112. Later, Maxwell testified that before Raborn became the third-shift machine operator, Maxwell did not have to relieve the female employees "quite as much," because the other machine operator helped Maxwell relieve "some."

to relieve the female workers.[113] Turnbull testified that because fewer machines were operated on the third shift than on the other shifts, the batter mixer had only 2½ to 3 hours' total mixing time work for the evening. Similarly, Denton testified that most of the time Maxwell "don't have that much on the batter to do," and that when he was caught up on his own work, he was expected to help the feeder, help relieve, or help the cone operator. In view of Maxwell's initial admission that he performed about the same amount of work when Raborn was machine operator as when Swann was machine operator, the internal inconsistencies to Maxwell's testimony, the fact that Maxwell was supposed to spend only a small part of his time as batter mixer, and demeanor reasons, I do not accept Maxwell's and Denton's testimony regarding his complaints to her about Raborn or Maxwell's testimony, credibly denied by Raborn, regarding Raborn's work performance.

Denton and Coots both testified that Coots complained to Denton every morning about Raborn's third-shift performance. Denton further testified that Coots had told Denton that third-shift batter mixer Maxwell did most of the inspecting because Raborn would not do it. As previously noted, Coots testified that there was a full-time inspector during the first 2 days when Raborn worked on the third shift; and it is undisputed that there was a full-time inspector on that shift during his remaining 2 days on that shift. Further, as previously noted, the third-shift batter mixer was expected to do a substantial amount of relieving because he mixed batter for fewer machines than batter mixers on other

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113. Later, Maxwell testified that the amount of time he spent performing relief work while Raborn was the machine operator required Maxwell to work overtime in order to catch up on his own job. His timecards were not produced for either before or after Raborn became the third-shift machine operator.

shifts; whereas machine operator Raborn had to operate as many machines as machine operators on other shifts. Moreover, both Coots and Denton testified to the absence of any problems on the third day when Raborn worked that shift, and it is undisputed that he was discharged at the end of the fourth day he spent on that shift. Accordingly, and for demeanor reasons, I do not credit Denton's or Coots' testimony about Coots' alleged complaints regarding Raborn.

Denton further testified that employee Swann "would always complain about [Raborn] standing with his arms folded"; and that after Raborn went on the third shift, Swann told her he had to spend 80 percent of his time doing Raborn's job, and could not do his own work as a packaging man. Swann did not testify. Turnbull's and Maxwell's testimony shows that Swann was working on the third shift (initiated on March 29) for an undisclosed period before Raborn's May 6 transfer thereto. Turnbull testified that a packaging man could have as much as 80 percent of his time free. The undisputed testimony shows that one of the four shifts worked by Raborn on the third shift was wholly trouble-free. As previously noted, Raborn's personnel folder contains no notations regarding complaints about him from Swann or any other employee, although Denton and other supervisors had a practice of making notations of complaints made against employees by other employees. In view of the peculiarities in the absence of corroboration for Denton's testimony in connection with Swann's alleged complaints to her, I discredit such testimony.

Employee Clark testified that during Raborn's first night shift, when she was acting as a "feeder" transferring cones between belts, she saw Raborn standing with his arms folded, and asked him to help remove some of the scrap; and that he refused on the ground that this

was not his job. Clark did not testify that employee Maxwell was present during this conversation. Maxwell testified that this alleged conversation occurred while he was helping Clark, and that Raborn had been sweeping the floor.[114] The credible evidence shows that during that shift, Raborn was extremely busy because he had been required to act as both machine operator and cone inspector. I accept his testimony that he truthfully told Clark that he had no time to help her.

Denton credibly testified that on several occasions while Raborn was a first-shift machine operator (that is, during April or early May 1982), she told Raborn that the cones were running too short in length. Raborn credibly testified, in effect, that such comments were a common occurrence with respect to cones produced by all of the cone operators. His testimony in this respect is indirectly corroborated by the fact that as to each set of machines Respondent assigns an inspector whose duties include advising the operator if a machine is producing defective cones, and discarding such cones. I do not accept her testimony that he failed to correct the situation.

Maxwell testified that a couple of weeks before Raborn's discharge, Raborn said that "he dared the Company to fire him. He said he didn't give a damn, let them go ahead and try." Maxwell testified that this incident occurred while Raborn was working on the third shift; Raborn was transferred to that shift less than a week before his discharge. For this and demeanor reasons, I credit Raborn's denial.

Maxwell testified that on a date he was not asked to

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114. Maxwell dated this alleged incident as 3 weeks after Raborn went on the third shift, where Raborn worked for less than a week before his discharge.

give, while he and Raborn were on the third shift, Maxwell concluded that Raborn had time to relieve the female workers, that he so remarked to Raborn, and that Raborn replied that he did not have time. As to this matter, I credit Raborn's testimony that he would always help out other employees if he had time.[115]

In short, I credit Raborn's testimony (substantially corroborated by Summers) that except when others told Raborn that one of his machines was producing defective cones (as the machines normally did from time to time, whereupon others were supposed to advise him of the defects as part of their jobs so that he would adjust the machine), no supervisor or fellow employee ever complained to him about his work. During Raborn's last year of employment, he was absent from work about twice.

I *The Representation Election*

The Regional Director's Decision and Direction of Election issued on May 10, 1982, 2 days before Raborn's discharge. The Decision included the usual provision that the eligible employees would include those in the unit who were employed during the payroll period ending immediately before the date of the Decision, except those who had thereafter been discharged for cause.[116] The Decision also found, in agreement with the Union, that 13 "temporary employees" were ineligible to vote; as of May 10, these comprised all current employees hired since the July 1981 separations. The record fails to show when Respondent received a copy of this Decision.

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115. In connection with Maxwell's credibility generally, I note his testimony that he complained to management that Wanda Hicks was leaving the batter room in bad shape. It is uncontradicted that she was the first shift batter mixer and he was the third-shift batter mixer.

116. The Decision was issued on a printed form which contains such provisions.

The election was held on June 4, 1982.[117] The tally of ballots consisted of 5 votes for the Union, 18 votes against the Union, and 35 challenged ballots. Of these challenged ballots, 18 were cast by employees whose separation is attacked in the instant complaint.[118] No objections were filed to the election.

J. *Analysis and Conclusions*

1. The alleged supervisory status of the floorladies and Coots

a. *The floorladies at the old plant*

When Turnbull first assumed responsibility for the plant, in early 1981, all production operations were supervised by general production manager Hood, admittedly a supervisor at all relevant times. About February 1981, Turnbull promoted Denton and Yvonne Broadwell to the newly created positions of production manager and assistant production manager, respectively. Denton, who was admittedly a supervisor at all times material here, was in charge of all production, and supervised the floorladies, the cone inspectors, the cone-machine operators, and the packagers.[119] Just before the July 1981 separations, Respondent employed about 45 persons in these classifications, who were working on two different shifts. Denton reported to Hood and Turnbull. Yvonne Broadwell, admittedly a supervisor at all

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117. The General Counsel's brief asserts that Raborn acted as the Union's observer. The election was held after the hearing had closed, but Respondent has not advised me that the General Counsel's brief is in error.

118. Namely: Bates, Baltimore, Benton, Bush, Carolyn Caldwell, Cunningham, Ellis, Finley, Peggy Fitzgerald, Bernice Hawthorne, James Hawthorne, Hubbard, Raborn, Sisk, Varner, White, Wells, and Zackery.

119. Initially, she was put in charge of only the floorladies and the cone inspectors. Within 30 days, in March, she was put in charge of the operators and packagers also.

relevant times, reported to Hood, Turnbull, and (according to Turnbull) Denton, and apparently served essentially as Denton's substitute and assistant. Hood, Denton, and Yvonne Broadwell had the authority to fire. Hood and Denton had the authority to hire; Broadwell had the authority effectively to recommend hiring. Denton and Broadwell made up the daily schedules specifying which individuals were to work which shifts, and which individual first-shift production employees were to perform which jobs. Broadwell drew up the job assignment schedule for the second shift. Denton and Broadwell had authority to direct the working of overtime by employees. Broadwell, Denton, or another supervisor had to initial the relevant timecard before an employee could be paid overtime; in some cases, the overtime had been worked before the card was initialled.

All nonclerical plant personnel except Hood are paid on an hourly basis. After Denton and Broadwell were promoted to their supervisory jobs, they continued to punch a timeclock and to receive time and a half for overtime. Their hourly rate was increased to $5.90 cents more than the highest paid rank-and-file employee at that time. The early April 1981 institution of wage classes meant that Denton's and Broadwell's $5 rate was the same as that of a night-shift floorlady who had qualified as a Class 1 operator. Both Denton and Yvonne Broadwell in fact qualified as Class 1 operators. Moreover, as discussed *infra*, both of them in fact worked to some extent on the night shift. Shortly after their promotion, Respondent sent them and general production manager Hood on a field trip to Chicago to look over a plant like the plant to which Respondent moved its operations about the end of 1981. Two or three months later, Respondent sent all three from Chattanooga to New Orleans for a supervisory seminar. None of the floorladies was sent on these trips.

As previously noted, the old plant had four production floors. During the first shift, one floorlady was assigned to each operating floor. During the second shift, which operated between February 1981 and the July 22, 1981, separations, a floorlady worked on each operating floor, and there was also an "extra" floorlady. The floorladies' principal responsibility was to perform the duties of cone packers when they were on their breaks (a function in which floorladies other than the "extra" floorlady spent 70 percent of their time), but they were also responsible for keeping all packing materials and supplies on the cone packers' tables. Recommendations from the floorladies that particular applicants be hired were not acted upon without independent investigation. Floorladies had no independent authority to discharge employees or to effect disciplinary suspensions. Employees were never refused the right to go home early; but laying to one side the "extra" floorlady, floorladies merely made a written record of such incidents, and had no authority to determine whether such early leaving was excused.

About twice a week, Turnbull, Hood, Denton, and Broadwell met to discuss such matters as plans for the new plant, the financial state of the business, personnel problems, and the testing procedure; these meetings were not attended by the floorladies. Every day, Denton and Broadwell would meet with all the floorladies on both shifts, to discuss such things as what product or products were to be made that night, what machines were going to run, what to do if particular machines broke down, employees' qualifications for wage increases, whether particular employees were good employees, problems with employees, and employees' failure to comply with the dress code. Sometimes, Hood and/or Turnbull attended these meetings. Sometimes, "to the extent that [Turnbull] wanted the information

to flow," these meetings were also attended by machine operators, who were admittedly employees.

The record contains a printed payroll change notice, dated April 8, 1981, which called for an 80-cent increase in employee Griffin's hourly rate. The notice is signed by floorlady Cooper (in the space called for a forman's signature) and by general production manager Hood. In what appears to be Cooper's handwriting, the notice states, under "Remarks," "Doing a good job. I approve." Another printed payroll change notice, bearing the same date, called for a 45-cent increase in Bernice Hawthorne's hourly rate. The notice is signed by then floorlady Baltimore (in the space calling for the foreman's signature) and by Hood. After "Remarks" is the notation, in what appears to be Baltimore's handwriting, "Doing her work & great job of it." These documents from Respondent's personnel record corroborate one-time floorlady Weaver's testimony, which I credit, that during the daily production meetings, floorladies could recommend a raise for employees who, in the floorladies' opinion, had learned to operate the necessary machines. I accept production manager Denton's testimony that such raises were not given without an investigation by her or Hood; but particularly in view of the foregoing payroll change notices, I do not accept her further testimony that she gave such recommendations no more weight than such recommendations from admitted rank-and-file employees.

Prince and Weaver, both of whom at one time worked as floorladies, credibly testified that if an employee was out too many times, the floorlady was to talk to her; and if such absenteeism continued, the floorlady would in her presence write up and sign a warning notice which was also to be signed by Denton or Hood. The record contains an employee warning notice, dated June 25,

1981, and issued to employee White, which is signed by Nellie Chandler, inferentially a floorlady at that time. Hood also signed this document. Under "Remarks" is the statement, in handwriting which may be Chandler's and is definitely not Hood's, "Insubordinate would not do what she was told without arguing all around bad attitude." Immediately thereafter appears the notation, in different and unidentified handwriting which may be Denton's and is definitely not Hood's, "6/26/81 not in proper dress code." I accept Turnbull's testimony that floorladies reported infractions in work performance to Denton or Broadwell, who would investigate such reports and decide whether they wanted to discipline the employee. However, in view of the foregoing testimony by Prince and Weaver and the foregoing warning notice, I do not accept Denton's testimony that she gave no more weight to a floorlady's recommendation that an employee be disciplined than to a like recommendation from an admitted rank-and-file employee.

About 3 weeks after the initiation of periodic rating sheets on each employee by admitted supervisors Hood, Denton, and Broadwell, floorladies were also directed to fill out such rating sheets for the purpose (the floorladies were told) of determining who was to be transferred to the new plant. Turnbull testified that the rating sheets filled out by Hood, Denton, and Broadwell — but only by them — were used in deciding whether an employee was to receive an oral work-related reproof, was to be laid off, or was to be transferred to the new plant. I infer that the rating sheets filled out by the floorladies were used for the same purpose, although these rating sheets were likely accorded less weight than those filled out by their superiors. I do not credit Turnbull's testimony, partly corroborated by Denton, that Respondent directed the floorladies to fill out such

sheets with the motive of letting the employees know that ratings were being made. Employee Peggy Fitzgerald credibly testified that employees were advised of the rating system at a February 1981 meeting conducted by Turnbull.[120]

Floorladies were paid 15 cents an hour more than they would have been paid if they had been admittedly rank-and-file cone packers on their respective shifts. They continued to receive this 15-cent premium even when they were not performing floorladies' duties because the floor to which they were ordinarily assigned had been temporarily shut down. Floorladies received the same fringe benefits as admitted rank-and-file employees. All other things being equal, in case of layoffs Respondent gave retention preference to floorladies because of their production versatility and their ability to fill out personnel forms.

In February 1981, Respondent set up a night shift. Hood did not ordinarily work on the night shift. Turnbull made Denton and Broadwell responsible for covering both shifts. In consequence, Denton and Broadwell began to work very long hours. About the beginning of May 1981, Denton asked Evelyn Weaver, who was a floorlady on the day shift, to help Denton out on the night shift. Weaver agreed, and thereupon became the "extra" floorlady on the night shift. Denton called the other floorladies together and told them that Weaver was their supervisor on the night shift. Denton told them to come to Weaver with their problems; that she would make the reports about people who left early; that

120. These ratings were admittedly not used in connection with the July 22, 1981, separations; and I find *infra* Part II J 3 a(2) that they were not used in connection with many of the July 10, 1981, separations. However, the record does not exclude the possibility that these ratings were used in connection with the June 1981 layoffs (not alleged to be unlawful) and some of the July 10 separations.

she would decide whether, when machines broke down, to cut them off or to call Denton and Hood; and that Weaver was to decide where the men were supposed to work. Thereafter, Denton and Broadwell conducted a production meeting with Weaver every evening. They gave her a list of what was going to run and where the employees would be working. If a machine was running badly, Denton or Broadwell would tell Weaver that she could keep a couple of employees overtime to perform the work by hand. Then, Denton and Broadwell would leave the plant for the day. If Denton telephoned the plant to issue further instructions with respect to the second shift, she would ask for Weaver. In making major decisions not covered by prior instructions, Weaver would call Hood, Denton, or Broadwell. Otherwise, Weaver handled all the problems after these supervisors had left for the day, and thereafter reported to them about any such problems.

When overtime was to be worked, the employee who was working on the machine where overtime was required would initially be asked by Weaver to stay overtime. If that employee did not want to work overtime, Weaver would ask the senior employee who (she thought) would accept the overtime. Such overtime requests were made by Weaver only, and not by the other floorladies. Turnbull testified that Broadwell, Denton, or another supervisor had to initial the relevant timecard before overtime would be paid. Weaver sometimes signed such timecards, but only where Denton and Hood had already agreed that overtime was to be worked.

Turnbull testified that if Weaver was confronted with an unanticipated problem and could not reach Denton, Broadwell, or Hood by telephone, Weaver was expected to use her best judgment, and that any criticism she

would receive would be based upon the merits rather than on the fact that she took it upon herself to handle the problem; but he did not know whether any such event had ever in fact occurred. Weaver was not told by Respondent that she was going to get additional compensation by virtue of her being an extra floorlady on the second shift; and she received no extra benefits therefor.[121]

If an employee were late, Weaver made a file record and spoke to Hood and Denton about such tardiness the next day. On June 22, 1981, Weaver filled out an absentee report stating that employee Bates had been absent with permission, because her sister was having a serious operation. This document bears only Weaver's signature, and was not initialled by anyone else. Weaver testified that she filled it out because "it was an emergency and [Bates] had to leave in a hurry." As previously noted (*supra* Part II D), on July 1 1981, Weaver filled out and signed an "absentee report" alleging that employee Zackery had failed to go directly to her machine after clocking in. On May 11, 1981, Weaver signed, in a space with the printed designation "foreman," a slip stating that employee Baltimore's hourly rate was to be cut 15 cents an hour because she was no longer a floorlady. This document was also signed by Hood. Baltimore had been demoted at her own request; and, as previously noted, floorladies received a 15-cent differential. As previously noted, on one occasion after Weaver had ascertained that employee Bernic Hawthorne might be suffering from high blood

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121. When Weaver went on the second shift in early May 1981, she received a 10-cent wage increase, to $4.45 an hour, which constituted a shift differential. In early July 1981, she received a wage increase to $4.85, in consequence of qualifying as a Class 1 operator. The regular rate for such an operator was $4.75. It is unclear whether the extra 10 cents was a floorlady differential (ordinarily 15 cents) or a shift differential.

pressure, she was transferred from the double machines she had been working on; inferentially, this transfer was effected pursuant to Weaver's recommendation. As previously noted, on one evening in early July 1981, supervisor Broadwell, who was paying an unscheduled visit to the plant during the second shift, told Weaver to exclude from the plant people who were not on the clock. Denton credibly testified that Weaver usually spent none of her time relieving, unless somebody was out or some trouble came up.[122]

Turnbull testified that Respondent had no supervisors on the second shift. Denton or Broadwell often worked until 7 p.m., 3½ hours before the end of the second shift. Also, on several occasions, Broadwell (at least once, accompanied by Denton) came back to the plant, unannounced, to see how the employees were doing.

Cooper was a second-shift floorlady until July 22, 1981, when that shift discontinued. Then, she was transferred to a cone-packing job. Weaver served as a floorlady until she went on vacation on July 13, 1981. Upon her July 19 return from vacation, she was assigned to the wrapping machine, where she worked until her separation on July 22, 1981. Her termination slip states that she was a "packer." No contention is made that she was a supervisor at the time of her allegedly discriminatory separation. As found *supra*, Bernice Hawthorne was a floorlady for the weeks just before her last day of active employment, 2 days before her termination during a 2-day leave of absence. There is no evidence that any other alleged discriminatee was a floorlady when terminated.

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122. In view of Denton's testimony in this respect, and the functions performed by Weaver but not the other floorladies, I do not accept Turnbull's testimony that Respondent had an extra floorlady during the second shift solely because Denton and Broadwell were not available for relief work during that shift.

I agree with the General Counsel that Evelyn Weaver was a supervisor until 3 days before her separation, and that Evelyn Cooper was a supervisor until the July 22, 1981 separations. Through their participation in the rating system and in the daily conferences with Denton and Broadwell, they had authority, in Respondent's interest and in the exercise of independent judgment, effectively to recommend employees' discharge and layoff. In addition, they had authority, in Respondent's interest and in the exercise of independent judgment, effectively to recommend wage increases and discipline. For the same reasons, I find that Bernice Hawthorne was a supervisor during the last few weeks of her active employment. I conclude that Weaver was a supervisor for the further reason that when she was the "extra" floorlady on the second shift, comprising about nine people, she had the authority, in Respondent's interest and in the exercise of independent judgment, responsibility to direct the second-shift employees.

b. Coots

After the move to the new plant was completed, Hood remained general production manager and Denton remained production manager, Turnbull testified that the employees were told that Denton, Broadwell, Wanda Housley, "and the rest of the girls" would be supervisors, and would have the same authority as Hood so far as telling people what to do. Coots testified that she was the third-shift floorlady when Raborn was on that shift; and that herself aside, there was nobody in supervision on that shift. She testified, in effect, that she was in charge of that shift, but further testified that she had to call Turnbull, Hood, or Denton if anything happened. At the time that Raborn was discharged, about 10 people worked on that shift. In view of her testimony that Denton had told Coots she should give Raborn a warning slip, I find that she had authority to issue such slips notwithstanding her further testimony that she

"wouldn't think" she had such authority. Denton testified that Coots was concerned about production on the third shift because "she wanted third shift to work," and that she was afraid that shift would be cut off and she would lose her job. Coots testified that third-shift employees called Denton, and not Coots, if they wanted to take time off or were not going to report to work; and that if a third-shift employee reported to work sick, Coots had to call Denton to find out what to do.

My findings in the foregoing paragraph are based on testimony adduced before me with specific reference to the new plant. I conclude that such testimony, standing alone, establishes that Coots was a supervisor when Raborn was working on the third shift. More specifically, I believe that such testimony shows that Coots had the authority, in Respondent's interest and in the exercise of independent judgment, to discipline and responsibly to direct employees. I note, moreover, that on the basis of evidence adduced at the hearing conducted on April 23, 1981, 3 weeks before Raborn's discharge, the Regional Director found Coots to be a supervisor. In so finding, the Director relied, *inter alia*, on evidence that she attended daily production meetings and had authority to move employees between machines, and that employees could be disciplined for failing to obey her instructions. His findings and conclusions add weight to my similar conclusion here. *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978); *Air Transit, Inc.*, 256 NLRB 278 (1981), enf. den. on other grounds, 679 F.2d 1095 (C.A. 4, 1982).

2. The alleged independent interference, restraint, and coercion (other than the alleged no-talking rule)

As to the allegations that Respondent violated Sec-

tion 8(a)(1) of the Act in that on July 3, 1981, production manager Denton interrogated employee Carolyn Caldwell and threatened her and employee White, my action in discrediting the employees' testimony to this effect calls for dismissal of the complaint in these respects.

However, I agree with the General Counsel that Respondent threatened employees with discharge for union activity, and thereby violated Section 8(a)(1), when Denton, in employee Wills' presence, told employee Finley on July 10, 1981, that she was being laid off for signing a union card; and when on the same day assistant production manager Yvonne Broadwell implied to employee Bates that she was being laid off because Respondent suspected that she had signed a union card. Also, I agree with the General Counsel that on July 6, 1981, Respondent threatened to shut down the plant if the employees chose the Union, in further violation of Section 8(a)(1), when assistant production manager Yvonne Broadwell, in response to employee Sisk's untruthful assertion that she had not signed a union card, stated that company president Turnbull would be in there today and "they're liable to shut the plant down." Additionally, I agree with the General Counsel that Respondent violated Section 8(a)(1) when supervisor Yvonne Broadwell told employee Nella Broadwell in April 1982 that employees Raborn and Summers would lose their jobs because they were testifying for the Union.

Also, I find that Respondent violated Section 8(a)(1) when general production manager Hood engaged in surveillance over the union meeting on July 12, 1981. I do not accept the contention in Respondent's brief that Hood was driving by the union hall because he was going to a flea market, the explanation which Hood

underpersuadingly tendered at the time to employee James Hawthorne and others. Although Hood has been Respondent's general production manager at all relevant times, he unexplainedly failed to testify. Furthermore, Turnbull did not testify that Hood gave him an innocent explanation for Hood's presence, and did testify that Turnbull had "very strong counsel with him regarding that," an unlikely reaction to professions of a flea-market search. Moreover, the conversations on the following day between Summers (whose somewhat distinctive car had been parked in the lot outside the union hall while he attended the meeting), Hood, and Denton lend weight to the interference that Hood had driven by the union hall to find out how many and which employees had attended.

In addition, I agree with the General Counsel that Respondent unlawfully interrogated employee Zackery, in violation of Section 8(a)(1), when Denton approached her about mid-June 1981 and stated that Denton had seen her sign a union card, an assertion which impliedly called for a confirmation or denial by Zackery; and when floorlady Weaver asked employee Baltimore, about early July, whether she had signed a union card. In so finding, I rely on the fact that Respondent was thereby seeking information useful for discrimination; Zackery's evasive responsive laugh and the untruthfulness of Baltimore's reply; Weaver's concomitant assertion that the Union would never get in there, that everybody would be gone by then; the absence of assurances against reprisal; Respondent's subsequent discrimination against employees who included Zackery and Baltimore (see *infra* Part II J 3); Respondent's threats of discharge and plant shutdown for union activity; and the absence of any legitimate purpose for such inquiries.

However, I decline to find that Respondent also violated Section 8(a)(1) when floorlady Cooper asked employee Prince, on June 30, whether she had signed a card. Although I have found Cooper to be a supervisor, she was only a first-line supervisor, and her remarks made it clear that her inquiry was a preliminary to efforts by her to help bring the union into the plant. Thus, Prince testified that she talked about the Union with "Girls...I felt I could trust," including Cooper. Moreover, nothing in Cooper's remarks or their context tended to lead employees to believe that management generally was trying to bring the Union into the plant. The complaint allegation that Respondent violated the Act through Cooper's remarks to Prince will be dismissed. See *N.L.R.B.* v. *Wehrenberg Theatres, Inc.*, 111 LRRM 2684, 2686 (C.A. 8, 1982); A.T.&K. Enterprises, 264 NLRB No. 164 (ALJD p. 12) (1982).

3. The allegedly unlawful separations, reprimand, and no-talking rule

a. *The alleged 1981 discrimination*

(1) The separation of Baker, Benton, Brown, Capes, Cunningham, and Huggins

As previously noted, there is no evidence that alleged discriminatees Baker, Capes, and Huggins in fact engaged in any union activity before their separations, nor is there any specific evidence that Respondent believed they had done so. Although alleged discriminatees Benton, Brown, and Cunningham did sign union cards before their separation, there is no credible evidence that they did so under circumstances where management was in a position to observe them, and no specific evidence that Respondent thought that they had

engaged in union activity. Apparently, the General Counsel has included such employees in the complaint on the theory that the Union's advent unlawfully motivated Respondent in its decision to effect mass separations in July 1981. See, e.g., *Majestic Molded Products, Inc.* v. *N.L.R.B.*, 330 F.2d 603, 606 (C.A. 2, 1964). Such a theory gains support from Respondent's representations to the Industrial Development Board of Chattanooga that more employees would be employed at the new plant than at the old one, and by president Turnbull's representations to the employees that there was room for all of them at the new plant, he needed them, and they just needed to work hard to make the effort. Further, Turnbull testified before me that the speeches including these representations to employees were made "in order to communicate exactly what would be taking place."

However, while these representations were being made in public, Respondent was privately drawing up drawings, tables, and memoranda, all of which anticipated that upon the move to the new plant, fewer employees would be needed to produce a given number of cones. Also during this period, Respondent lost some of its old and anticipated customers to the cone business newly established by its former vice president. In addition, and before the Union's advent, Respondent instituted its employee rating system, which would be useful in selecting employees for separation if it transpired that not all were needed. Furthermore, Respondent's work force at the new plant never became as large as the work force at the old plant. I infer from these circumstances and the probabilities of the situation that at all material times before the move took place, Respondent hoped and expected that the move would enable it to use fewer employees than previously to produce a given number of cones; and hoped, but

doubted, that its cone sales would increase, in which event it would need at the new plant most or all of the employees who had been working for it at the old plant. Furthermore, I credit the evidence that Respondent's public representations about the anticipated size of its work force were motivated by a desire to obtain the tax-free bond to finance the new building and to prevent the employees from quitting while Respondent still needed their services at the old plant.

Accordingly, I conclude that the record fails preponderantly to show that Respondent had a fixed and constant intention, before the Union's advent, to transfer all the employees to the new plant. Therefore, I conclude that the record fails preponderantly to show that it was the Union's advent which motivated Respondent's 1981 decision not to retain its entire work force. Thus, the record fails preponderantly to show that employees Baker, Benton, Brown, Capes, Cunningham, and Huggins were unlawfully separated because they were "white sheep" who "suffer[ed] along with the black" (*Majestic Molded, supra,* 330 F.2d at 606). The complaint as to them will be dismissed.

(2) The remaining July 1981 separations

However, an employer who has decided for lawful economic reasons to diminish the size of his work force violates Section 8(a)(3) and (1) of the Act by selecting employees for inclusion in the layoff because of their actual or suspected union activity. *Sumco Manufacturing Co.,* 251 NLRB 427, 438 (1981), enfd, 678 F.2d 46 (C.A. 6, 1982); *Pace Oldsmobile, Inc.,* 256 NLRB 1001, 1008-1009 (1981), enfd. in rel. part and remanded in part, 681 F.2d 99 (C.A. 2, 1982); *Townsend and Bottum, Inc.,* NLRB 207, 217 (1981). The record contains direct evidence that Finley was included in the separations

for that reason — namely, Denton's statement to her that she was being laid off because she had signed a union card. For the reasons set forth below, I conclude that except for Baker, Benton, Brown, Capes, Cunningham and Huggins (see *supra* Part II J 3 a (1)), all the alleged discriminatees separated in July 1981 were included in these separations because of their union activity or suspected union activity.

Thus, the record shows that Respondent repeatedly threatened to discharge employees for union activity and to close down the plant if the employees chose a union. such threats were made to several of these alleged discriminatees personally — more specifically (see *supra*), Prince, Sisk, Bates, and Baltimore. Further, general production manager Hood expressed apprehension that Bush's action in going to the union hall to obtain union cards would lead to his discharge unless he gave Turnbull an apology (which Bush did not give). Further, I conclude that the record preponderantly shows that Respondent knew or suspected that all 22 of these alleged discriminatees had engaged in union activity. Thus, as previously noted, when laying off alleged discriminatee Finley, production manager Denton told her that Denton knew she had signed a union card. Denton made similar remarks to Zackery and (although prematurely) to Weaver. Denton made notations on July 1 that alleged discriminatee Sisk had been engaging in union activity; and on the same date, Broadwell made a similar notation regarding alleged discriminatees Wilcox and White.[123] In mid-June and again on July 2, Denton remarked that James Hawthorne was signing people up for the Union. Before

123. In view of this evidence that Respondent thought that Wilcox was engaging in union activity, no showing need be made that she in fact did so. N.L.R.B. v. *Clinton Packing Co.*, 468 F.2d 953, 955 (C.A. 8, 1972); *Crucible, Inc., Division of Colt Industries, Inc.*, 228 NLRB 723, 729 (1977).

his July 8 exclusion from the plant, he obtained signed authorization cards in the plant lounge. Among those from whom he obtained signed authorization cards were alleged discriminatees Bush, Cranmore, Peggy Fitzgerald, Elroy Hawthorne (James' brother), Lee, and Prince; and James Hawthorne also solicited signatures from alleged discriminatees Baltimore and Carolyn Caldwell, both of whom signed at others' solicitation. Also, in mid-June and thereafter Denton remarked that Willie and Mae Caldwell were giving out union literature and authorization cards. As noted *supra*, they engaged in much of this activity at their van in view of Respondent's office. At this van, alleged discriminatee Bates signed an authorization card while Denton and Yvonne Broadwell were sitting in a nearby car. Also at this van, authorization cards were picked up from and/or returned to Willie and Mae Caldwell by, *inter alia*, alleged discriminatees Finley, Hubbard, Sisk, and Wills. The alleged discriminatees included Willie Caldwell's daughter-in-law, Zackery; Mae Caldwell's daughter and Willie Caldwell's stepdaughter, White; Willie and Mae Caldwell's daughter, Carolyn Caldwell; James Hawthorne's wife, Bernice, and his brother, Elroy; Bernice Hawthorne's brother-in-law, Ellis; Peggy Fitzgerald, whose husband, before his discharge, had initiated the union organizational campaign; and Peggy Fitzgerald's sister-in-law, Prince. Furthermore, Respondent made affirmative efforts to find out the identity of union adherents. Respondent's highest ranking supervisor (except Turnbull) engaged in surveillance over the July 12 union meeting attended by (*inter alia*) Bush, Ellis, Griffin, James Hawthorne, and Prince, all of whom were included in the July 20-24 separations. During this visit, Hood conversed with alleged discriminatees James Hawthorne, and was in a position to observe alleged discriminatee Prince. Also, Hood caused employee Summers, whose car was parked in a lot

outside the union hall who was not discharged, to make an untruthful disclaimer to Denton about his union sentiments. The two supervisors (Denton and Broadwell) immediately under Hood made notations of the names of employees who engaged in union activity and the dates and nature of such activity. Supervisor Weaver's interrogation of Baltimore about the Union evinced management's well-founded suspicion of her union sympathies. I infer that management were able to find out what they were anxiously looking for.

Moreover, the reasons which Respondent has advanced for selecting these employees for inclusion in the separations are either nonexistent, false, highly improbable, or unsupported by available, but unproduced, company records.

Thus, Turnbull's and Denton's testimony that Respondent had not initially intended to include employee Lee in the July 10 separations, and did so at her request made on that date, is belied by Denton's internal notations, dated July 8 and 10, which established that the decision to include Lee in the layoff was made up later than the decision to include other women who were laid off. Turnbull's and Denton's testimony that an employee's having "qualified" on double machines was given substantial weight in deciding whom to retain on July 10 is substantially undermined by Respondent's selection, for inclusion in the July 10 separations, of "Class 1" operators Carolyn Caldwell (a "great" worker), Peggy Fitzgerald, Lee, and Bernice Hawthorne (who was doing a "great job" and had been assured that she was going to the new plant). Moreover, Respondent also included in the July 10 separations alleged discriminatees Sisk (who had received a potted flower from Turnbull for doing "such a good job" on the combined machines); Bates (who had been promised an in-

crease to a Class 1 operator's rate, and was one of the first employees who learned how to run double machines); and Baltimore (one of the first two employees to learn how to operate the combined wrapper, and who was also capable of working on double machines). Also, Baltimore, Bernice Hawthorne, Hubbard, Lee, Prince, and Weaver were included in the separations although they had at one time served as floorladies and Turnbull testified that Respondent prefers to retain such personnel because of their demonstrated versatility. The employees separated on July 20-24 included a former supervisor, Elroy Hawthorne, who had been removed from his supervisory post at his own request; and employee (Bush) whom general production manager Hood described as an employee whose work he liked; and three "Class 1" employees (Griffin, Prince, and Weaver). While it is true that the record shows certain deficiencies in some of these 22 individuals, there is no testimonial evidence that such deficiencies contributed to their selection for separation, nor does the record show that Respondent's management regarded such shortcomings as serious enough to affect these individuals' periodic ratings. Indeed, although Turnbull testified that these rating sheets played a part in Respondent's decision about whom to include in the July 10 separations, such sheets were not produced, although they were still in existence at the time of the hearing. Respondent's failure to produce them leads me to infer that if produced, they would have shown that the ratings of employees selected for inclusion in the July 10 separations were as good as or better than retained employees' ratings. *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168, 174 (1973); *Ohio Calcium Co.* v. *N.L.R.B.*, 133 F.2d 721, 727 (C.A. 6, 1943); *International Union, United Automobile, Aerospace and Agriculture Implement Workers of America* v. *N.L.R.B. (Gyrodyne)*, 459 F.2d 1329, 1335-1345 (C.A.D.C., 1972); *Zapex Corp.*, 235

NLRB 1236, 1239 (1978), enfd. 621 F.2d 328 (C.A. 9, 1980).

Particularly in view of Respondent's maintenance of these rating sheets, Respondent's contention that it selected the July 20-24 alleged discriminatees for separation merely because they happened to be working on the second shift seems improbable. Rather, it would appear more natural that Respondent would select for separation the least desirable employees, regardless of their shift, and transfer to the first shift the retained second-shift employees. Particularly odd was Respondent's termination of employee Ellis, who was Respondent's only batter mixer and whose termination required the training of a series of new batter mixers, including at least one employee (Hicks) who never worked for Respondent at the old plant and had worked for Respondent at the new plant for only a few weeks. Further, although the work performed at the old plant by the other three laid-off male employees was functionally similar to that of machine operator at the new plant, Respondent obtained new machine operators by training one or two former shipping employees. Also, the four males laid off with the second shift included three machinists (Bush, and James and Elroy Hawthorne),[124] although Turnbull testimonially attributed Respondent's January 1981 decision to abandon making cone machinery for 2 years partly to a need for "all of our machinists" to move into the new plant; and during his January 1981 speech to the employees about the move, stated that the male employees would have more work moving to the new plant and would have to schedule their vacations for some other period.

124. It is unclear from the record whether Bush was working on the second shift before his vacation, during which he was terminated, James Hawthorne had been on sick leave for several weeks before his termination, although his most recent active work had been performed on the second shift.

Moreover, although no contention is made that the second-shift alleged discriminatees were separated for any shortcomings as employees, their separation slips stated that they had been terminated, and not that they had been laid off. When it transpired that the terminations had left Respondent shorthanded at the old plant, Respondent elected to work an undisclosed amount of overtime, and to transfer unseparated employees to a reestablished second shift, rather than to recall the separated employees. The straightforwardness of Turnbull's testimony regarding Respondent's alleged undifferentiating treatment of second-shift personnel is further drawn into question by his use of a demonstrably unauthentic document to corroborate his testimony that termination of the second shift was decided on as early as June; by the inconsistencies, in Denton's allegedly contemporaneous notes, as to whether the separation of the second-shift employees was decided on after the decision to effect the July 10 separations;[125] by seond-shift alleged discriminatee Prince's receipt of a 55-cent wage increase effective July 2; by the inconsistencies between on the one hand Turnbull's testimony that the July 10 separations were effected partly because Respondent had accumulated enough fountainpack stock, and on the other hand Broadwell's representation to the employees, and Denton's internal notation dated July 10, attributing the separations partly to the alleged slacking off of orders; and by the evidence impeaching Turnbull's testimony that second-shift worker Cooper was transferred to the first shift, instead of being discharged on July 22 with the rest of the shift, because on July 1 she had agreed to accept a sanitation job at the new plant (*supra* Part II A 10). Casting further doubt

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125 Thus, a Denton memorandum dated July 8 states that the eight-employee second shift and the two-employee sugar roll cone "department" were to be phased out "when production allows." However, a Denton memorandum dated July states, "We hope the [July 10 separations] will be last layoff."

on the sincerity of Respondent's professed motives for the separations is Turnbull's testimonial effort to imply that alleged discriminatee Finley could have avoided separation by bidding for the posted sanitation job. This attempted implication ignores the documentary evidence that the posted job was supervisory in nature, and would be wholly unrealistic assuming the accuracy of Yvonne Broadwell's testimony that Cobb was selected to fill that posted supervisory job (although Turnbull's explanation for Cooper's and — to a degree — Cobb's retention depends on his testimony that the plan for one supervisory sanitation job was changed to three non-supervisory sanitation (cleaning) jobs).

Particularly in view of Respondent's "discharge" notation regarding the July 20-24 separations, the inconsistencies in Respondent's expressed intentions regarding the recall of the employees separated on July 10 cast further doubt on the good faith of Respondent's explanations for the separations. When effecting these separations, Respondent drafted separation slips stating that they had been separated for lack of work, and without any mark in the box before "Discharge." Moreover, some employees were affirmatively told that they would be called back — more specifically, Finley, Sisk, White, Wills, Cunningham, and Bates. However, Denton's internal notations about the July 10 separations state that they were permanent; and after Bates' separation, Respondent advised the city housing authority that she had been terminated and Respondent did not know when she would return to work. Eventually, after beginning operations in 1982 at the new plant, Respondent made no job offers at all to 11 of the 18 cone packers terminated in 1981, successfully encouraged the prompt quitting of one cone-packer (Varner) who was called back, and laid off another (Prince) whose work was as good as that of employees who were retained; while hir-

ing about 45 new employees off the street. As shown *supra* Part II E 7 c, Turnbull gave unlikely and internally inconsistent explanations for this policy, which by late May 1982 had led to the inclusion in Respondent's work force of 13 employees (including 7 or 9 permanent employees) who never worked for Respondent at the old plant.

Lending further weight to the inference of discriminatory selection is the confusion in Respondent's evidence regarding the relationship, if any, between the separations and the disposition of the fourth-floor machines. A September 1981 letter to an NLRB field examiner from Respondent's labor relations adviser, and subscribed to in Turnbull's prehearing affidavit, states that Respondent laid off the fourth-floor employees in order to rebuild all seven of the machines on that floor. However, at the hearing, the parties stipulated that nine machines, including seven fountain-pack machines, were on this floor; and Turnbull did not testify (although supervisors Denton and Yvonne Broadwell did) that Respondent intended to rebuild any of the fourth-floor machines. Rather, Turnbull testified that Respondent decided, in February or March 1981, to sell (rather than use in the new plant) the seven fountain-pack machines, and that Respondent thereupon consequently decided that the fourth floor would be the first one to go. However, he gave internally inconsistent testimony about when (if ever) these machines were sold and when they were disassembled (see *supra* Part II A 6). Inconsistently with Turnbull's testimony, assistant production manager Yvonne Broadwell testified that Respondent planned "all along" to begin the move to the new plant by moving the machinery to that plant from the fourth floor. Moreover, when separating the first-shift employees on the fourth floor, Broadwell told the employees (inconsistently with Turnbull's testimony)

that the machines on that floor would be the first to be moved to the new plant. Also somewhat inconsistently with Turnbull's testimony, a Denton notation dated July 10 states that Respondent had decided to cut off the fourth floor "because we are going to start moving machines." Moreover, that same notation (General Counsel's Exhibit 96) makes the inaccurate assertion that Peggy Fitzgerald and Zackery, both of whom were included in the July 10 separations, had been working on the fourth floor. Another Denton notation (General Counsel's Exhibit 97), also dated July 10, makes no fourth-floor assertion as to any employees except Finley, Sisk, White, and Wills; and names Sisk both as working and as not working on that floor.

Finally, I note that these 22 alleged discriminatees had seniority dates going back to 1965, 16 years previously. While Respondent contends that seniority was not a factor in determining who was to be laid off, an employee's long-time retention indicates characteristics which Respondent allegedly did consider, such as acceptable attendance, promptness, and obedience.

For the foregoing reasons, I find that Respondent separated Baltimore, Bates, Bush, Carolyn Caldwell, Cranmore, Ellis, Finley, Griffin, Peggy Fitzgerald, Bernice Hawthorne, Elroy Hawthorne, James Hawthorne, Hubbard, Lee, Prince, Sisk, Varner, Weaver, White, Wilcox, Wills, and Zackery because of their actual or supposed union activity. My finding that Bernice Hawthorne was a supervisor requires dismissal of the complaint as to her. *Parker-Robb Chevrolet, Inc.*, 262 NLRB No. 58 (1982).

(3) The reprimand of employee Zackery

Further, I agree with the General Counsel that the reprimand of employee Zackery dated July 1, 1981, was motivated by her union activity and, therefore, violated Section 8(a)(3) and (1) of the Act. Zackery was the daughter-in-law of Willie Caldwell, who engaged in a substantial amount of organizing activity while parked in his van in view of Respondent's office. About mid-June 1981, production manager Denton correctly remarked to Zackery that she had signed a union card. After stopping off at her father-in-law's van immediately before clocking in on June 29, Zackery received at Denton's instance a written reprimand for the ostensible reason that Zackery had gone out to talk to the Caldwells after clocking in, even though both then floorlady Hubbard and employee Bates corroborated Zackery's truthful denials by truthfully stating that it was Bates who had done this. Three days later, Denton remarked that employees who joined the Union would get writups. Particularly because Bates was acting against her own interest by taking the blame, I can perceive no reason other than the union activity of Zackery and her family for Respondent's persistence in reprimanding her for conversing with the Caldwells at a time when she had not done so.

b. *The allegedly unlawful 1982 discharges; the allegedly unlawful no-talking rule*

(1) The discharge of Mark Raborn

In addition, I agree with the General Counsel that Mark Raborn was discharged, in violation of Selection 8(a)(3) abd (4), and (1) of the Act, because of his union activity and because he testified before me in support of the Union's charge.

After Raborn advised general production manager

Hood that Raborn had been supoenaed to testify before me, supervisor Yvonne Broadwell told employee Nella Broadwell that Raborn would lose his job because he was going to testify for the Union at the trial. After Raborn had attended the hearing pursuant to the subpoena, supervisor Yvonne Broadwell and production manager Denton told employee Nella Broadwell that he was thought to be making favorable remarks to other employees about the Union, and urged Nella not to talk to him. Also, Denton inserted into his personnel file a notation that he had been talking to another employee "about union" and was blaming Denton for the layoffs attacked in the complaint.

After Raborn had testified for the General Counsel and his union card had been received into evidence, he was transferred to the third shift, where Respondent attempted to create a plausible reason for getting rid of him. Thus, during the first two of the four night shifts worked by Raborn, he was required to perform the duties of an inspector as well as operating his six machines, although Turnbull testified that a cone inspector's job with respect to six machines was a full-time job and utility person Coots, the supervisor on that shift, had unsuccessfully attempted to get "them" to assign an inspector thereto. Furthermore, Raborn was discharged at the end of his fourth night shift even though his production during three of these shifts was about the same as the production on that shift before his transfer thereto, and his production on his remaining night shift was significantly higher (an inference which I drew from the unidentified evidence that the machines that night ran "perfect," from Hood's approving comments at the end of that shift, and from Respondent's unexplained failure to show the level of production during that shift). Moreover, general production manager Hood, who had presaged Bush's discharge for

union activity, accompanied Hood's notification to Raborn of his transfer and his discharge by stating that Hood hated to do it but was going to have to do it. In addition, when first-shift batter mixer Hicks complained to Denton that for "days" third-shift batter mixer Maxwell had been leaving the batter room floor wet with flour and water, Denton accompanied by a reference to Raborn's participation in the Board hearing Denton's groundless efforts to place the ultimate responsibility on him, although he had worked only 2 nights on the third shift, during which he had served as cone inspector and machine operator.

Furthermore, Raborn's separation slip alleged that Respondent had made continuing unsuccessful efforts to change his work habits and that he was uncooperative with fellow workers. However, Raborn had had only one counselling session (which had nothing to do with either of these alleged deficiencies); and aside from the memorandum regarding this counselling session, Respondent's written records contain no even allegedly material notations regarding Raborn, although Respondent's supervisors have a practice of making such notes regarding deficiencies in Respondent's employees.

For the foregoing reasons, I find that the real reason for Raborn's discharge was his union activity and his conduct in testifying before me in support of the Union's charge. In so finding, I note, moreover, Raborn's timecards materially impeach Turnbull's testimony in connection with why Raborn was discharged. These timecards establish that Raborn began to work on the third shift on the evening of Thursday, May 6, and that he worked a total of four such shifts before his discharge. However, Turnbull in his testimony attributed to Raborn the low third-shift production on the shifts which began on May 3, 4, and 5 (see *supra* fn. 104). Moreover,

Turnbull strongly implied that Raborn's allegedly poor performance on the third shift was to a significant extent responsible for Dowling's alleged conclusion as of Monday, May 10, that the third shift (initiated on March 29) was costing too much, although as of May 10 Raborn had worked only two such shifts and during both of these shifts production was comparable to third-shift production before his transfer.

(2) The no-talking rule directed to and the discharge of Nella Broadwell

The undisputed evidence establishes that while cone inspectors are actively working, they are ordinarily permitted to talk to other employees, including the machine operators, about any subject, so long as the inspectors remain at their work stations. Further, machine operators are ordinarily permitted during working hours to talk to other employees, including inspectors, during periods when the machine operators' active services are not required. Indeed, on occasion the inspectors' duties require the inspectors to talk to the machine operators. However, production manager Denton instructed cone inspector Nella Broadwell to refrain from talking to machine operators Summers and Raborn, even while she was at her job station, on the stated ground that Denton suspected that these machine operators were trying to induce Nella Broadwell to support the Union. By Denton's issuance of such instructions for this reason, Respondent further violated Section 8(a)(1) of the Act. *N.L.R.B.* v. *Lou DeYoung's Market Basket,* 406 F.2d 17, 22 (C.A. 6, 1969);[126] *Professional Air Traffic Controllers Organization,* 261 NLRB No. 132

126. Remanded on other grounds, with instructions to remand to Board for further proceedings, 39 S U.S. 828 (1969); remanded to Board, 414 F.2d 351 (C.A. 66, 1969); decision on remand, 181 NLRB 35 (1970), enfd. 430 F.2d 912 (C.A. 6, 1970)

(1982); *Hammary Mfg. Corp., a Division of U.S. Industries, Inc.*, 258 NLRB 1319, fn. 2 (1981), amended, 265 NLRB No. 7 (1982).

Furthermore, Denton admitted that Nella Broadwell was discharged on April 22 because of that day's incident when she expressed resentment of the fact that Denton had forbidden conversations between Nella Broadwell and machine operators Raborn (who worked about 3 feet from her) and Summers, about the only employees she would talk to without leaving her work station; while at the same time Denton and employee Clark were laughing and talking while they worked. However, an employee cannot lawfully be discharged for failing to respect an unlawful rule, particularly where, as here, that rule has been discriminatorily imposed on the employee. See *Hammary, supra; St. Vincent's Hospital*, 265 NLRB No. 6 (1982). Accordingly, Nella Broadwell's discharge violated Section 8(a)(3) and (1) of the Act.

Denton testified that Nella had no warning slips in her file; that she had given no trouble except for the occasions when she allegedly left her work station; and that but for "her coming up and cursing me and jumping on me, she would still be there as far as I'm concerned." Unlike Denton's and Clark's version of this incident, Nella's credible testimony shows that she raised her voice above normal but without shouting, put some hostility into it, placed her hands on her hips without making any menacing gestures, and said that if Denton was claiming Nella had not been doing her job, Denton was telling a "damn lie." Particularly in view of Denton's highly exaggerated description of Nella's language and gestures during this incident, I conclude that Nella was discharged because of the subject matter of her complaint (that is, the restrictions unlawful-

ly imposed on her in order to prevent her exposure to pro-union arguments) rather than because of her concomitant language and gestures. The use of foul language in the plant was not uncommon. Moreover, although Respondent contends that she was discharged pursuant to a plant rule which renders "insubordination" an offense subject to immediate dismissal, the only other occasion on which Denton ever discharged anyone for insubordination was the discharge (almost a year earlier) of an employee for conduct which (as described by Denton) was significantly more egregious than Nella's conduct.[127] In any event, Nella Broadwell's language and gestures were natural and not unreasonable reactions to the provocation afforded by Respondent's unlawful limitations on her talking with fellow employees. Accordingly, her language and gestures cannot serve to justify her discharge. *N.L.R.B.* v. *M & B Headwear Co.,* 349 F.2d 170, 174 (C.A. 4, 1965); *N.L.R.B.* v. *Steinerfilm, Inc.,* 669 F.2d 845, 852 (C.A. 1, 1982); *Coors Container Col.* v. *N.L.R.B.,* 628 F.2d 1283 (C.A. 10, 1980); *E. I. Dupont de Nemours,* 263 NLRB No. 15 (1982); *John Kinkel & Son,* 157 NLRB 744, 745-746 (1966); *Wometco Coca Cola Bottling Co.,* 255 NLRB 431, 446-447 (1981); *Sherwood Ford, Inc.,* 264 NLRB N. 116 (ALJD Part II B 5-6, C, pp. 12-16) (1982).

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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127. Benton testified that she discharged that employee after she started "busting up cones"; stated, "God damn you, I wish you would fire me. . . I'd like to own this company. I'd sue you to high heaven"; "kept on ranting and raving"; acted "very, very hostile"; and at one point seemed about to attack Denton.

3. Respondent has violated Section 8(a)(1) of the Act by threatening employees Virginia Wills, Ellen Finley, and Earline Bates that employees would be discharged for union activity; by threatening employee Nella Broadwell that employees who testified in support of the Union's charge would be discharged; by threatening to close down the plant if the employees chose the Union; by engaging in surveillance over a union meeting; by interrogating employees Mary Zackery and Betty Baltimore about whether they had signed a union card; and by discriminatorily forbidding conversations between employees Nella Broadwell, Jerry Summers, and Mark Raborn.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by separating Betty Baltimore, Earline Bates, Nella Broadwell, Bobby Bush, Carolyn Caldwell, Jo Ann Cranmore, Donald Ellis, Ellen Finley, Peggy Fitzgerald, Jurrelle Griffin, Elroy Hawthorne, James Hawthorne, Athelene Hubbard, Linda Lee, Juanita Prince, Linda Sisk, Wilma Ruth Varner, Evelyn Weaver, Dorothy White, Sarah Wilcox, Virginia Wills, and Mary Zackery.

5. Respondent has violated Section 8(a)(3), (4), and (1) of the Act by discharging employee Mark Raborn.

6. The unfair labor practices set forth in Conclusions of Law 3, 4, and 5, affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act by interrogating Carolyn Caldwell and Juanita Prince; by threatening Carolyn Caldwell and Dorothy White; or by separating Johnny Baker, Jr., Wilma Benton, Wanda Brown, Willie Lee Capes, Rita Cunningham, Bernice Hawthorne, and Ricky Huggins.

The Remedy

Having found that Respondent has violated the Act by engaging to certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom. Such unfair labor practices included the separation of 21 employees for union activity, the discharge of still another employee for union activity and testifying before the Board, the imposition of a discriminatory no-talking rule and the unlawful discharge of an employee for complaining about it, the reprimand of an employee for union activity, surveillance over a union meeting, interrogation regarding union activity, and threats to engage in unfair labor practices in the future. Respondent's unfair labor practices were committed over a period of 10 months, and largely by members of Respondent's top management who remained in Respondent's employ at the time of the hearing — namely, Respondent's principal operating officer (Turnbull), general production manager, production manager, and assistant production manager. I conclude that unless restrained, Respondent is likely to engage in continuing and varying efforts in the future to infringe on its employees' rights. Accordingly, Respondent will be required to refrain from in any other manner infringing on such rights. *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 437-439 (1941); *N.L.R.B.* v. *Southern Transport, Inc.*, 343 F.2d 558, 561 (C.A. 8, 1965); *N.L.R.B.* v. *East Texas Pulp & Paper Co.*, 346 F.2d 686, 689-690 (C.A. 5, 1965); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Affirmatively, Respondent will be required to offer the unlawfully separated employees immediate reinstatement to the jobs of which they were unlawfully deprived, or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority, pen-

sion rights, or other rights and privileges previously enjoyed. In addition, Respondent will be required to make them whole for any loss of pay they may have suffered by reason of the discrimination against them, less net interim earnings, to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corp.*, 231 NLRB 651 (1977). [128]

Also, Respondent will be required to remove from its files any reference to the unlawful reprimand and unlawful separations, and notify the discriminatees in writing that this has been done and that evidence of their unlawful reprimand and unlawful separations will not be used as a basis for future personnel action against them. *Sterling Sugars, Inc.* 261 NLRB No. 71 (1982). In addition, Respondent will be required to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:[129]

ORDER

Respondent Turnbull Cone Baking Company of Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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128. See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

129. In the event that no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Threatening that employees will be discharged for union activity or for testifying before the Board; threatening to shut down the plant if the employees choose union representation; engaging in surveillance over union meetings; interrogating employees about union activity in a manner constituting interference, restraint, and coercion; and, with a purpose of discouraging union solicitation, forbidding conversations between employees at times and under circumstances where conversations are generally permitted.

(b) Discharging, laying off, reprimanding, or otherwise discriminating against any employee with regard to his hire or tenure of employment or any other term or condition of employment, to discourage membership in Local Lodge 56 of the International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

(c) Discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act:

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer the following employees immediate and full reinstatement to the positions of which they were unlawfully deprived or, if those jobs no longer exist, to substantially similar posi-

tions, without prejudice to their seniority, pension rights, or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them in conformity with the section of this Decision entitled "The Remedy:" Betty Baltimore, Earline Bates, Nella Broadwell, Bobby Bush, Carolyn Caldwell, Jo Ann Cranmore, Donald Ellis, Ellen Finley, Peggy Fitzgerald, Jurrelle Griffin, Elroy Hawthorne, James Hawthorne, Athelene Hubbard, Linda Lee, Juanita Prince, Mark Raborn, Linda Sisk, Wilma Ruth Varner, Evelyn Weaver, Dorothy White, Sarah Wilcox, Virginia Wills, and Mary Zackery.

(b) Expunge from its files my reference to the unlawful reprimand and separations, and notify the discriminatees that this has been done and that evidence of the unlawful reprimand and separations will not be used as a basis for future personnel actions against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary or useful for analyzing and computing the amount of backpay due under the terms of this Order.

(d) Post at its Chattanooga, Tennessee, plant copies of the attached noticed marked "Appen-

dix."[130] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

The complaint is dismissed to the extent that it alleges that Respondent unlawfully interrogated Carolyn Caldwell and Juanita Prince, unlawfully threatened Carolyn Caldwell and Dorothy White, and unlawfully separated Johnny Baker, Jr., Wilma Benton, Wanda Brown, Willie Lee Capes, Rita Cunningham, Bernice Hawthorne, and Ricky Huggins.

Dated, Washington D.C. December 30, 1982

Nancy M. Sherman
Administrative Law Judge

130. In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization.
To form, join, or assist any union.
To bargain collectively through representatives of their own choice.
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection.
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten you with discharge for union activity or for testifying before the Board; threaten to shut down the plant if you choose union representation; engage in surveillance over union meetings; interrogate you about union activity in a manner constituting interference, restraint, and coercion; or, with a purpose of discouraging union solicitation, forbid conversations between you at times and under circumstances when conversations are generally permitted.

WE WILL NOT discharge you, lay you off, reprimand you, or otherwise discriminate against you with regard to your hire or tenure of employment or any term or condition of employment to discourage membership in LOCAL LODGE 56 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, or any other union.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL offer the following employees reinstatement to their old jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority, pension rights, or other rights and privileges previously enjoyed. WE WILL make them whole, with interest, for any loss of pay resulting from their separation:

BETTY BALTIMORE
EARLINE BATES
NELLA BROADWELL
BOBBY BUSH
CAROLYN CALDWELL
JO ANN CRANMORE
DONALD ELLIS
ELLEN FINLEY
PEGGY FITZGERALD
JURRELLE GRIFFIN
ELROY HAWTHORNE
JAMES HAWTHORNE
ATHELENE HUBBARD
LINDA LEE
JUANITA PRINCE
MARK RABORN
LINDA SISK
WILMA RUTH VARNER
EVELYN WEAVER
DOROTHY WHITE
SARAH WILCOX
VIRGINIA WILLS
MARY ZACKERY

WE WILL remove from our files any references to these separations and MARY ZACKERY's unlawful reprimand, and notify these employees in writing that this has been done and that evidence of these discharges and the reprimand will not be used as a basis for future personnel action against these employees.

TURNBULL CONE BAKING
COMPANY OF TENNESSEE

_____
(Employer)

Dated _____

By _____
(Representative)

_____
(Title)

_____

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Marietta Tower, Suite 2400, 101 Marietta St., N.W., Atlanta, GA. 30323 (404) 221-2886.

No. 85-1505

In the Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
MAY 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

TURNBULL CONE BAKING COMPANY OF TENNESSEE,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

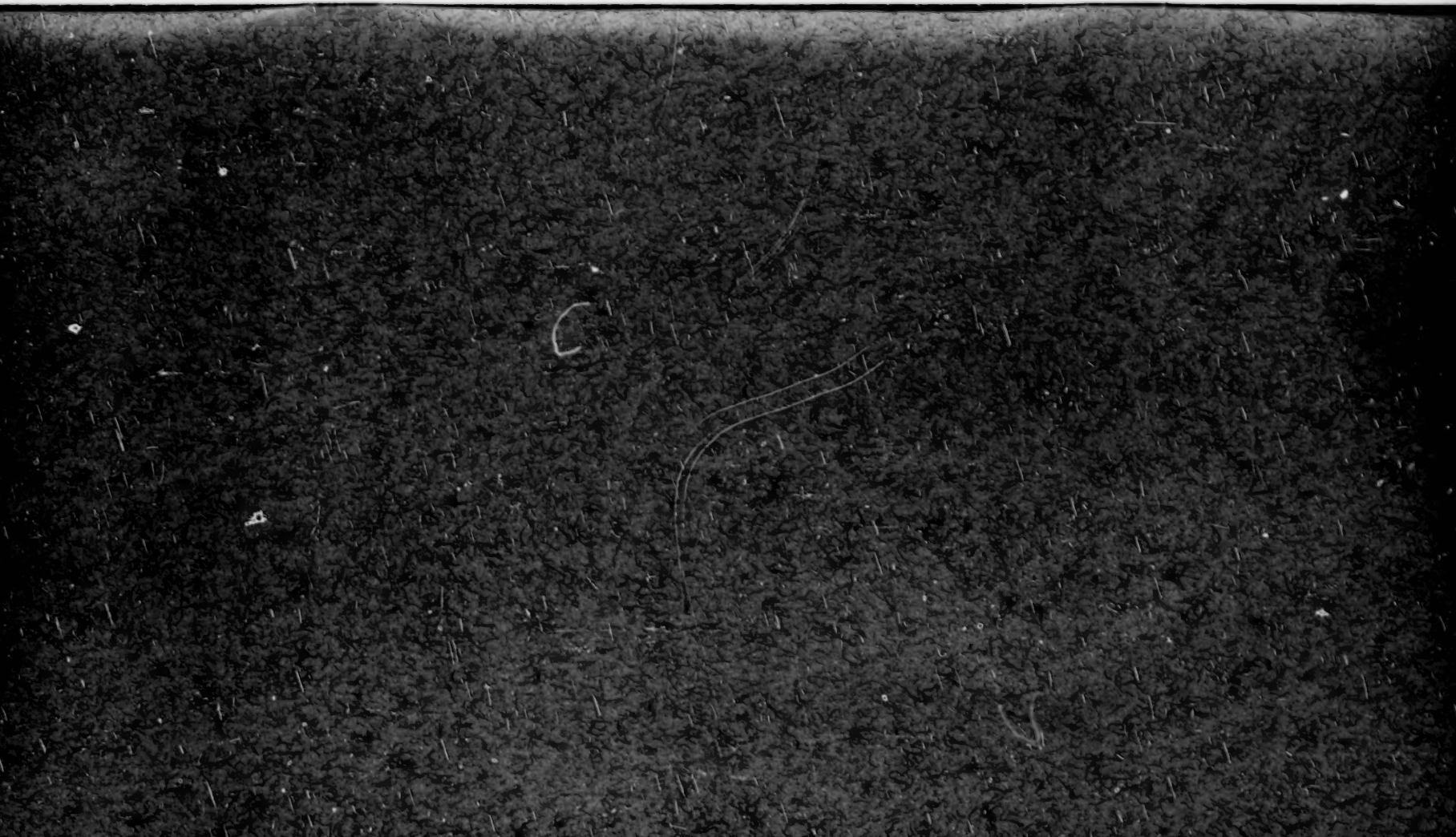
JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570



QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated the National Labor Relations Act by laying off a group of employees and discharging other employees because of their union activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1505

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 778 F.2d 292. The decision and order of the National Labor Relations Board (Pet. App. 13-15), including the decision of the administrative law judge (Pet. App. 16-166), are reported at 271 N.L.R.B. 1320.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1985. The petition for a writ of certiorari was filed on March 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act[.]

STATEMENT

The National Labor Relations Board found that petitioner committed numerous violations of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening and interrogating employees concerning their campaign to organize a union, and by engaging in surveillance of employees' union activities. The Board also found that petitioner discriminatorily disciplined one employee and laid off 21 other employees because of their union activities; that it discharged another employee because of his union activity and because he gave testimony at a Board proceeding concerning petitioner's unfair labor practices; and that it discriminatorily forbade an employee to talk with fellow employees because it

wanted to prevent conversation about the union campaign, and then unlawfully discharged the employee for protesting the rule. Petitioner does not challenge the Board's numerous findings of unlawful threats, interrogations, discipline and surveillance, but contends that the Board improperly concluded that the discharges were unlawful.

1. Petitioner manufactures ice cream cones at its plant in Chattanooga, Tennessee. In response to a decline in business, petitioner decided in 1980 and early 1981 to make certain changes designed to increase productivity. Specifically, petitioner decided to discontinue certain product lines and sell some of its machinery and to build a modern plant to replace the facility in which it had operated for many years. It was petitioner's intention to upgrade and consolidate its production processes in the new plant, with the ultimate objective of meeting its current production goals with fewer employees. Petitioner, however, also hoped that its sales might increase so that it might retain at the new plant all or most of its current workforce. Pet. App. 26-42, 141-142.

In late January 1981, petitioner's vice-president and chief operating officer, Wayne Turnbull, assembled the employees and informed them of the company's plans to move to a new facility later in the year. Turnbull did not tell employees that there would be layoffs either before or after the move, but instead stated that there would be a need for all current employees at the new facility and that all male employees would be needed to assist with the move. Pet. App. 32-33. At about the same time, because petitioner wanted to increase its inventory prior to the move, petitioner recalled a number of

employees who had been on seasonal layoff status (*id.* at 37).

Sometime in April, employee Mae Caldwell and her husband, a former company employee, began a union organizational campaign. The Caldwells solicited signatures on union authorization cards from a van that they parked outside the plant. In June, petitioner's production manager, Betty Denton, frequently observed the Caldwells as they campaigned for the Union (Lodge 56 of the Machinists) outside the plant. Pet. App. 42-44. Denton discussed the union campaign with vice-president Turnbull and other company officials, and during those discussions the officials identified the employees known to be involved (*id.* at 44-45).

Between late May and early July, all but one of the employees later found by the Board to have been discriminatorily terminated signed union cards.[1] Employees obtained or returned cards at the Caldwells' van or in the plant. Several of the discriminatees were relatives of the principal union organizers. Pet. App. 43, 45-46, 47, 50-52, 62, 69-70. In mid-June, production manager Denton accused employee

---

[1] These employees were Betty Baltimore, Earline Bates, Bobby Bush, Carolyn Caldwell, Jo Ann Cranmore, Donald Ellis, Ellen Finley, Peggy Fitzgerald, Jurrelle Griffin, Bernice Hawthorne, Elroy Hawthorne, James Hawthorne, Athelene Hubbard, Linda Lee, Juanita Prince, Linda Sisk, Wilma Ruth Varner, Evelyn Weaver, Dorothy White, Virginia Wills, and Mary Zackery (Pet. App. 43, 45-47, 50-52, 61-62, 70-71, 72; GCX 15) ("GCX" references are to the General Counsel's exhibits introduced at the unfair labor practice hearing). The one discriminatee who did not sign a card, Sara Wilcox, had been observed by a supervisor to be "talking union" on her break (Pet. App. 49).

Zackery of having signed a union card. On June 29, employee Earline Bates signed a card at the Caldwells' van while company supervisors sat in a car parked near the van. *Id.* at 52, 77. Also on that date, employee Zackery stopped to talk at the Caldwells' van. Zackery then punched in on time and went directly to her machine, but was issued a "warning notice" for reporting to work late. *Id.* at 52-54.

On about July 1, plant manager Tom Hood told employee Bush that he would be fired unless he apologized to vice-president Turnbull for having become involved with the union campaign. Also around that time, various supervisors wrote memos documenting their observations of employees either signing cards or discussing the Union. Pet. App. 46, 49, 86. At a production meeting attended by certain supervisors on July 2, manager Denton became upset and stated that employees would get "writeups" if they joined the Union and also stated that employee James Hawthorne was recruiting people for the Union. Supervisor Evelyn Weaver asked employee Baltimore whether she knew anything about the Union and stated that "the Union would never get in there, that everybody would be gone by then." *Id.* at 48-49, 70. On July 6, employee Sisk told assistant production manager Yvonne Broadwell that she had not signed a union card, to which Broadwell responded (*id.* at 52): " 'Well, Wayne Turnbull will be in here today, and they're liable to shut the plant down.' "

On July 10, petitioner laid off 12 of the employees who had signed cards or had been observed discussing the Union. Employee Finley asked production manager Denton why she was being laid off despite her seniority status, and Denton replied that

"'we're laying you off * * * because I know you signed a union card'" (Pet. App. 64). When employee Bates asked Denton why she had been laid off when another employee had been retained, assistant manager Broadwell, who was also present, asked Bates whether she had signed a union card. *Id.* at 56-64, 66-72, 75-80.

On July 11, vice-president Turnbull held a meeting of the remaining employees and told them about the plans for the move to the new facility. Turnbull stated that there would be no more layoffs, that the employees present at the meeting were "the cream of the crop" and would all be moving to the new plant, and that, as far as he knew, the new plant would operate on the same hours as the old one, and he hoped there would be two shifts. Pet. App. 81-82. The next day, at least 23 persons, 16 of whom were discriminatees, attended the first union meeting. During the meeting, plant manager Hood drove past the union hall several times at a slow speed. After several employees went outside and motioned Hood to stop, Hood asked how the meeting was going and then left. *Id.* at 83-84.

On July 13, the Union requested recognition as the employees' bargaining representative. By letter dated July 16 petitioner refused to recognize the Union without a Board-conducted election and certification. Thereafter, on July 22-24, petitioner terminated all the second shift employees except Evelyn Cooper, the only second shift employee who had not signed a union card. Of the approximately 35 employees remaining on petitioner's payroll after the July separations, 23 had not signed union cards. Pet. App. 85-90.

Soon after separating all the second shift employees, petitioner began working employees overtime. Petitioner moved to the new plant about December 1981, began a second shift in late February 1982, and added a third shift in March 1982. Between February and August, petitioner hired nearly 50 "temporary" employees to help clean out old packing material and also to do the same production work as the employees transferred from the old plant. Pet. App. 90-95.

In early April 1982, employees Mark Raborn and Jerry Summers received subpoenas to testify at a hearing concerning petitioner's alleged unfair labor practices. Soon thereafter, assistant production manager Broadwell told employee Nella Broadwell that Raborn and Summers would lose their jobs because they were going to testify against petitioner and that Raborn was specially targeted because " 'they thought he was an informant' " for the Union. Sometime between April 9 and April 16, manager Broadwell told Nella to stop talking so much to Summers and Raborn. Pet. App. 103-105.

On April 16, 1982, assistant manager Broadwell told Nella that she had been seen discussing the Union with Summers (Pet. App. 105-106). The next day, when Nella inquired whether an apparent crackdown on her work performance had to do with the Union, production manager Denton responded (*id.* at 107): "[Y]es, * * * 'I have so much trouble back there in the back that I have to constantly keep my eye on it * * *. I just can't take any chances.' " Later that day, Denton told Nella not even to say " 'good morning' " to Summers and Raborn because " 'it would just encourage them' " (*id.* at 107-108 & nn.92, 113). The next morning, when Nella com-

plained to Denton about not being permitted to talk to the employees working near her, Denton discharged Nella, assertedly for insubordination. Denton stated that Nella "had done this to herself, [and] that her work was good" (Pet. App. 108-111).

Finally, a few days after employee Raborn testified at the unfair labor practice hearing, he was transferred from the first to the third shift, which operated from 10 p.m. to 7 a.m. When he reported to the third shift on May 6, he was assigned to act as both machine operator and inspector for all six machines on the shift. Raborn told a supervisor that it was impossible to do both jobs; the supervisor agreed but stated that they had been unable to get management to assign an inspector. During that night and the next day, Raborn had trouble operating all the machines on the shift. On May 10, Raborn was told to serve only as machine operator, and the machines ran "perfect[ly]" that night. On the following night's shift, however, Raborn was again assigned both jobs. When plant manager Hood came in the next morning, he discharged Raborn for "not doing assigned work properly." Prior to his discharge, Raborn had never been warned about poor work performance. Pet. App. 112-117.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening and interrogating various employees and by engaging in surveillance of their union activities (Pet. App. 13-15, 137-140). The Board also found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by reprimanding employee Zackery and by laying off the 21 employees in July 1981 because of

their union activities, and by imposing a no-talking rule on employee Nella Broadwell and then discharging her for protesting that rule (Pet. App. 142-151, 155-157). Finally, the Board found that petitioner violated Section 8(a)(4), (3), and (1) of the Act, 29 U.S.C. 158(a)(4), (3), and (1), by discharging employee Raborn because of his union activity and because he testified at the unfair labor practice hearing (Pet. App. 152-155).

With respect to the termination of employees in July 1981, the Board found that, prior to petitioner's move to the new facility, petitioner "hoped and expected that the move would enable it to use fewer employees than previously to produce a given number of cones" and that it therefore could not be said "that it was the Union's advent which motivated [petitioner's] 1981 decision not to retain its entire work force" (Pet. App. 141-142). The Board noted, however, that "an employer who has decided for lawful economic reasons to diminish the size of his work force violates Section 8(a)(3) and (1) of the Act by selecting employees for inclusion in the layoff because of their actual or suspected union activity" (Pet. App. 142), and it concluded that petitioner had selected the employees for termination in July 1981 because of their union activities.

The Board explained that petitioner was aware of the union activity of the discriminatees and had demonstrated its hostility to the organizing campaign in the numerous instances of threats, interrogations, and surveillance that independently violated the Act (Pet. App. 142-145).[2] And the Board found that "the rea-

[2] The Board dismissed allegations that petitioner acted unlawfully in discharging six employees as to whom there was no evidence either that they had engaged in union activity or that petitioner suspected them of such activity (Pet. App. 140-142).

sons which [petitioner] has advanced for selecting these employees for inclusion in the separations are either nonexistent, false, highly improbable, or unsupported by * * * company records" (*id.* at 145). Specifically, the Board found that the record evidence belied petitioner's contentions that certain employees were selected for termination because they were less qualified or had poorer records than those retained, or that others were separated due to a lack of work on the second shift (*id.* at 145-151). The Board similarly found that "the real reason for Raborn's discharge was his union activity and his conduct in testifying * * * in support of the Union's charge," and that employee Nella Broadwell was discharged for protesting the unlawful anti-union rule imposed on her and for no other reason (*id.* at 152, 154, 156-157).

3. The court of appeals enforced the Board's order in full (Pet. App. 2-12). With respect to the discharges, the court noted that, although petitioner "asserted legitimate reasons for its selection of employees for layoff and for the discharges," the Board "considered each justification * * * and found each one pretextual" (*id.* at 5); it found "that the workers actually terminated or laid-off had been selected for illegal reasons (their real or suspected union activity)" (*id.* at 9). Concluding that these findings were supported by substantial evidence (Pet. App. 10, 12), the court rejected petitioner's contentions that the Board had erred in failing expressly to state its findings in terms of its *Wright Line*[3] analysis applicable to dual motive discharges; because the company "had failed to prove its affirmative defense," there re-

[3] *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

mained only an anti-union motive for its action and the *Wright Line* analysis was inapplicable (*id.* at 10).

ARGUMENT

Relying largely on a version of events that the Board did not credit and ignoring the credited evidence of anti-union conduct that formed the basis for the Board's findings, petitioner contends (Pet. 11-21) that the Board erred in failing to uphold the discharges here by applying its *Wright Line* analysis. This factbound contention was correctly rejected by the court of appeals, and review by this Court is not warranted.

In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), this Court approved the Board's allocation of the burden of proof set forth in *Wright Line* for determining the lawfulness of discipline of an employee engaged in union activity when the employer asserts that the adverse action was taken for lawful reasons. Under the Board's *Wright Line* analysis, where an employer's opposition to union activity has been shown to be a substantial or motivating factor in a decision to take adverse action against an employee, that decision will be found to constitute an unfair labor practice unless the employer is able to demonstrate that the adverse action would have taken place even in the absence of the protected conduct. *NLRB* v. *Transportation Management*, 462 U.S. at 401-403. But where, as here, the employer's proffered lawful reason is found to be a mere pretext to disguise unlawful discrimination, the Board's inquiry is logically at an end. As the Board has explained (*Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982)):

> [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

See also *NLRB* v. *Transportation Management*, 462 U.S. at 400 n.5.

Here, the Board found that, although petitioner did intend at some point to reduce the size of its workforce for legitimate reasons, its *sole* reason for selecting the specific employees who were discharged was its hostility to their union activity. The Board found that petitioner's asserted "reasons * * * for selecting these employees * * * [were] either nonexistent, false, highly improbable, or unsupported by * * * company records" (Pet. App. 145). In short, the Board found that petitioner's proffered reasons were pretextual and therefore that petitioner had failed to show any proper motivation for the adverse action; accordingly, petitioner failed to meet its burden of proving that the adverse action would have taken place absent the improper motivation. The court of appeals found that the finding of pretext was "supported by substantial evidence" (*id.* at 10). Given this finding, even petitioner concedes (Pet. 12 (footnote omitted)) that "*Wright Line* has no application." Thus, petitioner's argument amounts to no more than a claim that the findings of pretext were not supported by substantial evidence. That contention does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the court of appeals found and as the facts set forth above (pages 3-8, *supra*) plainly demonstrate, there is ample support in the record for the Board's conclusions that the dis-

charges in question were motivated by anti-union animus and that petitioner did not in fact rely on any legitimate reasons in discharging the employees.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

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[4] Petitioner's contention (Pet. 21-27) that the length of the decision of the administrative law judge precluded effective judicial review is without merit. The court of appeals noted that "[t]he facts of this case are well documented" in the decision of the ALJ (Pet. App. 3) and that the Board's conclusions were supported by the evidence. Moreover, we note that the length of the ALJ's decision was caused in substantial measure by the need to explain and analyze the numerous violations of the Act committed by petitioner and to consider the numerous pretextual justifications that it offered in an attempt to explain its unlawful conduct.

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